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KURT H. NADELMANN

The Judicial Dissent

Publication v. Secrecy

"The Rule of Law as Understood in the West" was considered at a round-table held by the International Association of Legal Science in Chicago in September, 1957. In the course of the discussion, a German participant, member of the German Constitutional Court, who had referred to a decision of his court, was asked what the vote had been in the case. His answer was a reference to a rule in German law requiring judges to keep the deliberation secret.

The question may be asked, and it has been, whether a system under which the results of the vote in a court and dissenting opinions are concealed, particularly in the highest courts, can be considered to be in harmony with the requirements of public control of the courts, the responsibilities of the office of the judge, and "The Rule of Law." Comparative studies of the practices of the highest courts are lacking.[1] An attempt will be made to survey shortly the law in the Western World on the right of judges to make their individual vote known.

Anselm von Feuerbach recalled that under early Germanic as well as early Roman procedure judgments were arrived at in public.[2] Secrecy both of the deliberations themselves and of the results of the vote seems to have had its origin in later Roman and later canonist procedure.[3] The practice of the courts of the Catholic Church has long been to keep the individual votes in secret archives.[4] Today the Codex prescribes secrecy for all that happens during the deliberation, and the rules of procedure provide that individual votes may not be made available even to the court of appeal.[5]

KURT H. NADELMANN is a Member of the Board of Editors. This essay will be published in the "Recueil d'Etudes en l'honneur de Hidebumi Egawa," in preparation.

[1] At Chicago (Proceedings in 9 Annales de la Faculté de Droit d'Istanbul (1959) 21), undertaking of such a study under the auspices of the International Association of Legal Science or some other qualified body was strongly recommended. The encyclopaedic work, Die Höchsten Gerichte der Welt (Julius Magnus ed., Leipzig., 1929), is deficient in many ways and out of date.

[2] 1 Anselm von Feuerbach, Betrachtungen über die Öffentlichkeit und Mündlichkeit der Gerechtigkeitspflege 62 (Germanic Law), 55 (Roman law) (1821). See Georg Ludwig Maurer, Geschichte des alt-germanischen und namentlich altbaierischen öffentlich-mündlichen Gerichtsverfahrens 36, 66, 86, 191, 230 (1824).

[3] Feuerbach, *loc. cit.;* Maurer at 315. See Georg Ludwig Boehmer, Principia juris canonici 631 (7th ed. 1802). But see 1 Cerchiari, Sacra Romana Rota 234 (1921), for instances in which lower court decisions started with: "Domini pro maiori parte censuerunt. . . ."

[4] Codified in Lex propria S. R. Rotae et Signaturae Ap., June 29, 1908, 1 Acta Apostolicae Sedis 20 (1909), Can. 31 § 2; Regulae servandae in judiciis apud Sacrae Romanae Rotae Tribunal, Aug. 2, 1910, 2 Acta 783 (1910), §§ 177 (2), 178 (5).

[5] Codex Juris Canonici, Can. 1623 (2), 1871 (2) (1917); Decree Provida, 28 Acta 313

The old Germanic tradition of deliberating and voting in public has been preserved in various Swiss Cantons.[6] Today, public deliberation and vote is prescribed for the upper courts in the Cantons Basle-City and Basle-Land, Zurich and Berne.[7] In civil cases, deliberation and vote are in public also in the Federal Tribunal, the Swiss Supreme Court.[8] The published judgment, however, does not report the vote.[9] In Neuchâtel, deliberation and vote are in public, but the judges may retire for consultation before the public deliberation.[10] The Neuchâtel procedural system has been adopted by Turkey.[11]

In England, as in early Germany, judging was traditionally in public, each judge stating what he thought the judgment should be. This was done even in courts as sinister as the Star-Chamber.[12] The tradition has not been broken: opinions are given seriatim—individually—in the English courts, and the same is done in Scotland, in Northern Ireland, and in the Irish Republic. In the Irish Republic, no dissent may be announced, however, in cases where the Supreme Court decides a question involving the constitutional validity of a law.[13]

(1936), § 203. See 1 William J. Doheny, Canonical Procedure in Matrimonial Cases 488 (2d ed. 1948).

[6] See Vorbericht zum revidierten Entwurf eines Gesetzbuches über das gerichtliche Verfahren in Civilsachen ix, x, quoted in 2 (I) Schurter and Fritzsche, Das Zivilprozessverfahren der Schweiz, 77, note 85 (1931); Samuel Ludwig Schnell, Entwurf eines Gesetzbuches für das gerichtliche Verfahren in Civilrechtssachen (Berne 1819).

[7] References in Max Guldener, Das Schweizerische Zivilprozessrecht 160 (2d ed. 1958). See Adolf Neuer, Die Öffentlichkeit der zürcherischen Gerichte (Zurich thesis 1946); Arnolf Morf, Das Prinzip der Öffentlichkeit in der schweizerischen Zivilrechtspflege (Zurich thesis 1951); Richard E. Tobler, Das Berner Handelsgericht und sein Verfahren 113 (Zurich thesis 1958). *Cf.* Arthur Bauhofer, Geschichte des Stadtgerichts von Zürich 47, 181 (1943); Ferdinand Elsener, Zur Geschichte des Majoritätsprinzips, insbes. nach schweizerischen Quellen, 42 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonische Abt., 560 (1956).

[8] Bundesgesetz über die Organisation der Bundesrechtspflege, Dec. 16, 1943, art. 17 (under 1874 Constitution). Originally, Eidgenössische Prozessordnung of 1850, art. 181 (under 1848 Constitution). For the law under Helvetia (1798 to 1803), see 1 Schurter and Fritzsche, *op. cit., supra,* note 6, at 156 (1924) (introduced by decree of July 13, 1798, abolished by decree of Sept. 1, 1798). For criticisms voiced, see Fleiner and Giacometti, Schweizerisches Bundesstaatsrecht 636, note 36 (1949).

[9] The opinion is prepared by the law clerk of the Tribunal.

[10] Code de procédure civile, art. 327 (1925).

[11] See Karlen and Arsel, Civil Litigation in Turkey 134 (Ankara 1957).

[12] "An author quoted by [John] Rushworth [Historical Collections of Private Passages of State, etc.], speaking of the constitution of that Chamber [the Star Chamber], says, 'And so it was resolved by the judges on reference made to them; and their opinion, after deliberate hearing and view of former precedents was published in open court' [2 Rushworth 475]. It appears elsewhere in the same compiler that all their proceedings were public, even in deliberating previous to judgment." Report of April 30, 1794, of the Committee of the House of Commons on the delays in Mr. Warren Hasting's trial, Hansard Parliamentary History, 3 The Jurist 232 (July 1832) (excerpt). Report drafted by Edmund Burke: 6 The Works of the Right Honorable Edmund Burke 423, 451 (1890).

[13] Irish Constitution of 1937, as amended by the Second Amendment of the Constitution Act, 1941, art. 34, 4 (5). See Donaldson, Some Comparative Aspects of Irish Law 33 (1957).

The Judicial Committee of the Privy Council, court of review for decisions from Dominion and Colonial appellate courts and highest court for appeals from decisions of the English ecclesiastical tribunals, has had a practice contrary to the English tradition. Only the "judgment of the Privy Council" is published.[14] Technically, the decision is a mere recommendation to the Sovereign, and indication of differences of opinion, it has been said, would be improper in such a recommendation.[15] When, in an ecclesiastical case, the Lord Chief Baron let it be known that he had voted against the majority decision, he was reprimanded by the Lord Chancellor for violation of the duty of secrecy.[16] Thus it is impossible to know whether, in a case involving Roman-Dutch law, or Hindu or Mohammedan law, or the Civil Code of Quebec, the member of the Judicial Committee expert in that law, assuming one was sitting in the case, had voted for or against the decision. Today, the Privy Council has lost its appellate jurisdiction for all Dominions except Ceylon, New Zealand, and Australia, and appeals from Australia are possible only within certain limitations.[17] More than a century ago, a member of the British Parliament suggested an end to the anomaly by giving decisions of the Judicial Committee the character of judgments.[18] He later declared—he had been Lord Chancellor in the meantime—that he would decline to sit on a court where individual members are not allowed to make their votes known.[19]

The English traditional system according to which each judge states

[14] *Cf.* 11 Works of Henry Lord Brougham 378, note (1873). But see at 312: "It was found, when the Judicial Committee of the Privy Council was formed, in 1833, that judgments were frequently pronounced with the entire concurrence of its members, while each of the four judges felt that, had he alone heard and decided, his judgment would have been different in particulars more or less important."

[15] See R. M. Jackson, The Machinery of Justice in England 78 (1953).

[16] On the controversy between the Lord Chancellor (Lord Cairns) and the Lord Chief Baron, Fitzroy Kelly, as to the right of the latter to express his dissent in the Folkestone Ritual Case, Ridsdale v. Clifton, 2 Law Rep. P. D. 276 (1877), see W. F. Finlason, The Judicial Committee of the Privy Council, preface i, 139 (1878); Selborne, Judicial Procedure in the Privy Council 3 (1881, 1891). Order in Council of Febr. 4, 1878, recalling Order of Febr. 20, 1627 (Old Style). *Cf.* 2 Phillimore, Ecclesiastical Law 976 (2d ed. by W. G. F. Phillimore, 1895). According to 1 Holdsworth, History of English Law 519 (3rd ed. 1922), there have been only three cases in which there has been any publication of dissenting opinions. But see, for a more recent likely case, Frank R. Scott, "Labor Convention Case: Lord Wright's Undisclosed Dissent," 34 Can. Bar Rev. 114, 115 (1956); MacKinnon, 34 *id.* at 115; McWhinney, 34 *id.* at 243. *Cf.* McWhinney, Judicial Review in the English Speaking World, Ch. 3, pp. 49, 54 (1956); Mankiewicz, "Interpretation judiciaire de la Constitution Canadienne," 11 Revue Internationale de Droit Comparé 535, 547 (1959).

[17] For suggestions for abolition, see Campbell, "Decline of the Jurisdiction of the Judicial Committee of the Privy Council," 33 Austr. L. J. 196, 208 (1959); Zelman Cowen, Book Review, 45 Calif. L. Rev. 400, 402 (1957).

[18] See Edward Sugden (Lord St. Leonards), Treatise on the Law of Property 52, 735, 737; 56 Hansard (3rd ser.) 186 to 200 (1841).

[19] Lord St. Leonards, 1856, Evidence before the Lord's Appellate Jurisdiction Committee, 1 Macqueen's Rep. of Scotch Appeals, H. of L., Appendix; Macqueen, The Peers' Debate on their Appellate Jurisdiction 95 (1857).

his opinion in open court, today is in operation in all parts of the British Commonwealth and Empire, even where, as in Quebec, the civil law prevails.[20] India and Pakistan have retained the practice.[21]

Passing to Scandinavia, in Norway's Supreme Court since 1864, following the English example, each judge states his opinion in open court.[22] In Sweden and Finland, a judge may announce his dissent and give the reasons for it.[23] In Denmark, dissents have been noted in the judgment since 1937, and the names of the dissenters since 1958.[24]

In the Western Hemisphere, the English colonial courts followed the English tradition. The traditional system was continued in the states of the United States. In the Supreme Court of the United States, members delivered individual opinions—seriatim—in the beginning.[24a] Shortly before John Marshall became Chief Justice, the custom developed that, instead of having each judge deliver his opinion, the Chief Justice would announce the "opinion of the Court"[25] and leave to dissenters announcement of their dissent. Marshall made this system the practice of the Court. He came under attack by Jefferson who considered it a danger to the freedom of the administration of justice.[26] The right to announce a dissent was never questioned.[27] Marshall used it only in important cases.[28] After Marshall's death the practice of delivering the "opinion of the Court"—if a majority can agree on such an opinion[29] —was continued but increased use was made by individual members of the right to state their own reasons in concurring or dissenting opin-

[20] Note that, in Quebec Civil Code cases, the Canadian Supreme Court often sits with a Quebec majority. McWhinney, "Federalism, Pluralism, and State Responsibility—Canadian and American Analogies," 34 New York University Law Review 1079, 1082, note 13 (1958).

[21] For criticism of a recent trend in India toward "Privy Council Habit," see Editorial, 2 Indian L. Q. 370 (1957).

[22] Law of April 11, 1863, 1 Hallager, Norges Høesteret 1815–1915, 351 (1915). Østlid, "Hvordan offentlig votering ble gjennomført i Norges Høesteret," [1955] Tidsskrift for Rettsvitenskap 170; Schjelderup, "Nogen ord om den offentlige votering i Norges Høesteret," [1926] Ugeskrift for Retsvaesen B 118 (Denmark).

[23] See Birger Wedberg in: Die Höchsten Gerichte der Welt 363, 368 (Magnus ed. 1929) (resulting from the "Principle of Publicity").

[24] Retsplejeloven of 1916, § 218, as amended by Law No. 112 of April 7, 1936, and Law No. 125 of May 10, 1958. *Cf.* Von Eyben, "Judicial Law Making in Scandinavia," 5 Am. J. Comp. L. 112 (1956).

[24a] See, e.g., State of Georgia v. Brailsford, 2 Dall. 402 (U.S. 1792).

[25] Brown v. Barry, 3 Dall. 365 (U.S. 1797), per Ellsworth, C. J. *Cf.* 1 Charles Warren, The Supreme Court in United States History 654 (Rev. ed. 1932).

[26] Letter to Thomas Ritchie, Dec. 25, 1820, 12 Works of Thomas Jefferson 175 (Ford ed., 1905); Letter to Justice William Johnson, March 4, 1823, 10 Writings of Thomas Jefferson 246, 248 (Ford ed., 1899).

[27] See Donald Morgan, Justice William Johnson—The First Dissenter (1954); Levin, "Mr. Justice William Johnson, Creative Dissenter," 43 Mich. L. Rev. 497 (1944).

[28] See his statement in Bank of the United States v. Dandridge, 12 Wheat. 64, 90 (U.S. 1827). Justice Story, in principle, adhered to the same view. Story to Henry Wheaton, April 18, 1818, 1 Wm. W. Story, Life and Letters of Joseph Story 303 (1851).

[29] Even under Marshall this was not always the case. See Marshall's statement in Olivera v. Union Ins. Co., 3 Wheat. 183, 195 (U.S. 1818).

ions. Such is the present state of affairs. In the opinion of not a few, exaggerated use has been made of this right by some judges.[30] Unanimous decisions, as in the recent Anti-Segregation Cases,[31] carry special weight.

While by no means uniform, the practice in the highest courts of the states of the Union does not differ essentially from that of the Supreme Court. Announcement of dissents is permitted everywhere. Back in 1845, when official reporting of the judgments of the state supreme court was introduced in Pennsylvania, dissents were barred from inclusion in the printed collection.[32] The provision was circumvented[33] or disregarded[34] and, in the end, repealed.[35] In Massachusetts, it has long been the practice of the highest court only to announce the opinion of the court. When the court is not unanimous, if no dissenting opinion is filed, the opinion merely states that it was by a majority of the court.[36] Members who dissent announce their dissent very rarely.[37] As a member of the court, Mr. Justice Holmes followed the tradition. When, after his appointment to the Supreme Court of the United States, he found himself for the first time constrained to deliver a dissenting opinion, he stated: "I am unable to agree with the judgment of the majority of the Court, and although I think it useless and undesirable, as a rule, to express dissent, I feel bound to do so in this case and to give my reasons for it."[38] The era of famous dissents by Holmes and Brandeis, many of which soon became the view of the majority of the Court, is too well known in the world to have to be retold here.[39] It is part of the living history of the United States.

The Supreme Court's practice has been to consider cases argued dur-

[30] The literature on abusive use of dissenting and concurring opinions is abundant. References may be found, e.g., in ZoBell, "Division of Opinion in the Supreme Court: A History of Judicial Disintegration," 44 Cornell L. Q. 186 (1959). A Justice of the Supreme Court recently announced a dissent when his eight brethren agreed that an important case should be reargued, on specified points, at the beginning of the next term. "Much has been said of late of the law's delay, and criticism has been heaped on the courts for it. This case affords a likely Exhibit A. It looks as if Scales' case, like Jarndyce v. Jarndyce, will go on forever, only for the petitioner, to reach his remedy, as did Richard Carstone there, through disposition by the Lord." Clark, J., dissenting, in Scales v. United States, 360 U.S. 924, 926, 79 Sup. Ct. 1444, 1445 (1959).

[31] Beginning with Brown v. Board of Education, 347 U.S. 483 (1954).

[32] 1845 P. L. 374 § 2.

[33] The reasons for disagreeing were stated orally and published: Dunn v. Commonwealth, 6 Pa. 384, 389 (1847); Weber v. Samuel, 7 Pa. 499, 527 (1848).

[34] Yeager's Appeal, 34 Pa. 173, 176 (1859); Commonwealth v. Cluby, 56 Pa. 270, 275 (1867).

[35] 1868 P. L. 46. See Simpson, "Dissenting Opinions," 71 University of Pa. L. Rev. 205, 208 (1923).

[36] See Note, "Majority Opinions: Notes from the Margin of Chief Justice Gray's Massachusetts Reports," 14 Mass. L. Q. No. 6, p. 131 (May 1929).

[37] For a recent case, see Matter of Gally, 329 Mass. 143, 107 N.E. 2d 21 (1952).

[38] Northern Securities Co. v. United States, 193 U.S. 197, at 400 (1904).

[39] See 1 André and Suzanne Tunc, Le Système Constitutionnel des États-Unis d'Amérique: Histoire Constitutionnelle 356 (1954), and references therein.

ing the week in "conference" on Friday. On the basis of the discussion and vote, the designation of the member who shall prepare the opinion of the Court is made by the Chief Justice or, if he belongs to the minority, the senior member of the majority. Drafts are circulated and commented upon. As reported by one Chief Justice, "an opinion circulated to the Court as a dissent, sometimes has so much in logic, reason and authority to support it that it becomes the opinion of the Court."[40] This system of guarantees for due consideration of each case by all members of the court is not followed in all states of the Union by their highest courts. One of the best experts in this matter, the late Chief Justice of New Jersey, Arthur D. Vanderbilt, has pointed out that in some courts the judge who will write the opinion is designated in advance, that after the case has been argued the reporter circulates a draft, and that if nobody dissents it becomes the opinion of the court without any discussion in conference whatsoever.[41] Calling a judgment of the court thus obtained "a fraud on the litigants and the public," Vanderbilt considered the so-called "one-man" opinion the greatest bane of appellate courts today.[42]

Colonial Latin America had the old Spanish and Portuguese systems of secrecy of judicial deliberation. In Spain, in the Ordinance of Medina of 1489, Ferdinand and Isabella directed the secular courts, shortly after the introduction of the Inquisition,[43] that they enter the results of the vote in a special book which was to be kept secret.[44] According to the explanation given in the Ordinance, undesirable arguments had arisen whether a judge had voted for or against a decision, and convicted persons had claimed that the verdict was not obtained with the required number of votes.[45] The "secret book" system is still in existence in Spain, but codification has brought changes in its application. Today, judges who have remained in the minority may, within 24 hours, enter their dissent and the reasons therefor in the secret book. If the case goes to the Supreme Court on appeal, the parties receive from the Court a copy of dissents entered in the book.[46] The voting in the Supreme

[40] Chief Justice Fred M. Vinson, Work of the Federal Courts, Address, 69 Sup. Ct. v, x (1949). *Cf.*, Clark, "Internal Operation of the United States Supreme Court," 43 J. Am. Jud. Soc'y 45, 49 (1959).

[41] Vanderbilt, Improving the Administration of Justice—Two Decades of Development 106 (Cincinnati 1957).

[42] *Idem* at 105. "Every member of the court should read the briefs, listen to the argument and discuss each case in conference before he knows whether he will be called upon to write the opinion for the court." *Id.* at 106.

[43] Introduced by Bull of Nov. 1, 1478. See Henry Charles Lea, A History of the Inquisition in Spain (1907).

[44] See 1 Vicente y Caravantes, Tratado histórico, crítico filosófico de los Procedimientos Judiciales en Materia Civil 88, 89 (1856).

[45] Text in Novissima Recopilación de las Leyes de España, lib. V tit. 1 § 15.

[46] Ley de Enjuiciamiento Civil, art. 367, 368 (1881) (replacing Code of 1855, art. 60); Ley de Enjuiciamiento Criminal, art. 156 (2), 157 (1882). Rules of Jan. 11, 1861, § 8. 3 Vicente y Carancantes, *op. cit.*, 858 (appendix). See 1 Prieto Castro, Derecho Procesal Civil 123 (1955); 1 De la Plaza Navarro, Derecho Procesal Civil Español 332 (3rd ed. 1951).

Court, on the other hand, is not made known.[47] Only for the Tribunal of Constitutional Guarantees created by the Republican regime was there a rule that dissenting opinions should be published together with the judgment.[48] While, in Spain, all judges must sign the judgment even when they voted against it,[49] in Portugal judges have had for a long time the right to add to their signature the word *vencido,*[50] and this right is used regularly.[51]

When independence came to Latin America, the Latin-American states, as is well known, drew heavily on the constitutional system of the United States.[52] The work of the United States Supreme Court received much attention, especially in the states with a federal system. Today the right of a dissenting judge to announce his dissent is established in Mexico,[53] in South America in at least Argentina, Brazil, Chile, Colombia, Ecuador, Peru, Uruguay, and Venezuela,[54] and, probably, also in all Central-American states.[55] The practice of publication of the decisions, however, varies from country to country. Of the Caribbean group, Haiti and the Dominican Republic seem to have kept the French system which imposes secrecy for the deliberation and vote. As far as Cuba and Puerto Rico are concerned, when they were occupied by the United States at the end of the last century, one of the first acts of the Military Government was to put an end to the Spanish system of the secret book and to prescribe publication of dissents together with the decision.[56] The reform has been maintained.[56a] The same occurred

[47] See Reglamento del Tribunal Supremo, Oct. 17, 1835, art. 17 (entry in secret book).

[48] Ley sobre el Tribunal de Garantias Constitucionales, of June 14, 1933, art. 97. The author is indebted to Dr. Niceto Alcalá-Zamora y Castillo for having called attention to this provision not referred to in current Spanish writings.

[49] For criticism, see Callejo de la Cuesta, "Publicidad de los Votos Reservados," 55 Revista de los Tribunales 65 (Spain 1921).

[50] Estatuto Judiciario, Decree-Law No. 35:388 of Dec. 22, 1945, art. 99 (1). Going back to Reforma Judicial, May 21, 1841, art. 713.

[51] See reports, e.g., in Boletim do Ministerio da Justicia. On dissents, see J. Alberto dos Reis, in a note on Sup. Ct., Oct. 16, 1953, 86 Revista de Legislação e Jurisprudencia 245 (1953).

[52] This development can be observed by looking, for example, at the translations of American works. See Nadelmann, "Apropos of Translations (Federalist, Kent, Story)," 8 Am. J. Comp. L. 204, 208 (1959).

[53] See Ley de Amparo, of 1936, art. 197; Codigo de Procedimientos civiles del Distrito Federal, of 1884, art. 613, 614, 619.

[54] See Reports of the Courts. For Brazil: Regimento interno do Supremo Tribunal Federal, Sept. 15, 1947, art. 68, 69; Regimen do Tribunal Federal de Recursos, same date, art. 78, 80; Codigo de Organização Judiciaria do Distrito Federal, Decree-Law No. 8,527 of Dec. 31, 1945, art. 30 (1). Venezuela: Ley organica de la Corte de Cassación, July 16, 1956, art. 37, reprinted in 10 Boletín del Instituto de Derecho Comparado de México, No. 29, 208, 210 (1957).

[55] See Reports. For Panama: Law on Supreme Court, No. 47 of Nov. 24, 1956, summarized in 10 Boletín del Instituto de Derecho Comparado de México, No. 29, 204, 207 (1957).

[56] Cuba: Order No. 63 of May 25, 1899, amending art. 366 and 367 of the Ley de Enjuiciamiento Civil. Puerto Rico: General Orders No. 118 of August 16, 1899, § 65, amending art. 366 of the Ley de Enjuiciamiento Civil.

[56a] For the Commonwealth of Puerto Rico, see Rules of the Supreme Court of Puerto Rico, March 15, 1946, Rule 20 (b), 4 P.R. Laws Ann. Rule 20 (b) (1954).

in the Philippines.[57] The Philippine Republic has embodied in its Judiciary Act the provision: "Dissenting opinions shall be published when the justices writing such opinions so direct."[58]

In Japan, where the Continental European practice of not revealing dissents was followed until recently, the Parliament, after the last war, changed the system. The Law of 1947 on Court Organization provides for the Supreme Court that, in decisions rendered in writing, each judge shall express his opinion.[59] Thus, concurring and dissenting opinions are made known.[60] While some of the reforms based on American influences have come under attack,[61] the principle of this reform does not seem to have met with any criticism of consequence.

Turning to the French area of influence, where the principle of secrecy obtains for the deliberation, the earliest decree imposing secrecy for happenings during the deliberation of the courts is a decree of 1344 by Philippe VI especially reminding the judge of the duty to keep to himself what happened during the deliberation.[62] Decrees of 1446 and 1453 provided for penalties in the case of violation of the duty.[63] For various reasons, sometimes heterogeneous, in the centuries which followed considerable importance was attached to non-violation of the rule of secrecy. Among other things, the rule developed into a protection of the judge from outside interference in the exercise of the judicial functions. As late as 1706, Chancellor d'Aguesseau called the secrecy of the deliberation "the strength of the feeble and the guarantee of justice."[64]

After the revolution, the distrust of the courts by the masses led to abandonment of secret deliberations. A law of September 1791 prescribed deliberation in public for criminal trials,[65] and the principle

[57] Act No. 136 of 1901 of the U.S. Philippine Commission on the Organization of Courts in the Philippine Islands, § 32.

[58] Republic Act No. 296, § 21, 27 Phil. Ann. Laws § 21 (1956).

[59] Law of April 5, 1947, Book II: Supreme Court, art. 11. See Oppler, "The Reform of Japan's Legal and Judicial System under Allied Occupation," 24 Wash. L. Rev. 290, 310, note 65 (1949).

[60] See 75 L. Q. Rev. 183 (1959) for a Comment by A.L.G. on the separate opinion given in the case of the translation and publication of Lady Chatterley's Lover, No. 2 in the Series of Prominent Judgments of the Supreme Court of Japan upon Questions of Constitutionality (1958).

[61] See Takayanagi, "Contact of the Common Law with the Civil Law in Japan," 4 Am. J. Comp. L. 60 (1955).

[62] Decree of March 11, 1344, art. 14 and 15, 4 Isambert, Recueil des Anciennes Lois Françaises 498. See earlier decree of Dec. 1320, art. 7, by Philippe V de Valois, 3 Id. at 254.

[63] Decree by Charles VII of Oct. 28, 1446, 9 *id.* at 149; decree of April 1453, art. 110, *id.* at 202. On the history, see Manuel Baudouin, "Le secret du délibéré et le droit de défense," 23 Journal des Parquets I 24, 44 (1908).

[64] 1 Oeuvres complètes du Chancellier d'Aguesseau 135, 142 (new ed. 1819). *Cf.* 1 Henrion de Pansey, De l'Autorité Judiciaire en France 247 (1827).

[65] Law of Sept. 16–28, 1791, tit. VIII, art. 9, 3 Duvergier, Collection des Lois 298.

was extended in 1793 to court proceedings in general.[66] A law of October 25, 1793, gave the judges permission, before public deliberation and vote, to retire for study of the record.[67] According to contemporary reports, public deliberation produced undignified scenes, and the Constitution of the Year III (1795) brought a return to the old rule: secrecy was once more prescribed for the deliberation.[68] The legislation on organization of the Court of Cassation produced procedural guarantees in other respects: the reporter must make his report on the case in open court, and the attorneys argue after having heard the report (which does not include the reporter's opinion on the issue).[69] This system with the report in open court has been preserved.[70] It is applied likewise in the Council of State sitting as a court.[71]

The obligation to keep the vote secret has not always been accepted with grace. Occasionally, judges of lower courts have refused to sign the decision of the majority, especially in criminal cases. Instances of this kind came before the Court of Cassation notably between 1822 and 1847.[72] In 1849, the form of the judge's oath was changed: the obligation "to keep the secret of the deliberation religiously" was added to the form of the oath.[73] While, today, the principle of secrecy is fully respected, it is not uncommon for judges in France who sat in a case to annotate the decision for one of the law journals which report decisions.[74] Judges, including reporters, have publicly defended decisions in which they participated.[74a] In this respect, the practice of opinion writing in the Court of Cassation must be kept in mind. The decision generally is a one sentence opinion—the sentence may be quite long—in which a doctrinal basis for the legal reasoning used is not necessarily

[66] Constitution of June 24, 1793, art. 94, 5 *id.* 357; Decree of June 26, 1793, 5 *id.* 359.

[67] Law of Brumaire 3, Year II (1794), art. 10, 6 *id.* 251.

[68] Constitution of Fructidor 5, Year III (1795), art. 208, 8 *id.* 234; Code of Brumaire 3, Year IV (1796), art. 435, 8 *id.* 419.

[69] Law of Nov. 27–Dec. 1, 1790, art. 13; Law of Brumaire 2, Year IV (1796), art. 19 and 21.

[70] See Faye, La Cour de Cassation 255 (1903). The governing text, today, is the law of July 23, 1947, [1947] Dalloz 275. Occasionally, the report is published. See, e.g., 39 Revue Critique de Droit International Privé 581 (1950), for report in Cass., Full Bench, Dec. 20, 1950, Gunguéné v. Falk, [1951] Sirey I 89.

[71] See Waline, Traité élémentaire de Droit Administratif 154 (6th ed. 1951); Lenoan, La Procédure devant le Conseil d'État statuant au Contentieux 182 (1954).

[72] See Cass. crim., June 27, 1822, [1822] S. I 516; April 27, 1827, [1827] D. I. 207, [1827] S. I 516; Aug. 18, 1831, [1831] D. I 317, [1831] S. I 329; Febr. 24, 1837, [1837] D. I 261, [1837] S. I 548; June 9, 1843, [1843] D. I 327, [1843] S. I 718; May 28, 1847, [1847] D. I 165, [1847] S. I 547. Cf. Appeal Montpellier, Febr. 7, 1928, [1928] D. Hebd. 232. See "Jugement," § 39, in Encyclopaedie Dalloz, 2 Procédure Civile 168 (1956).

[73] Law of August 18, 1849, on Court Organization, art. 3 (2), 4 Bulletin des Lois (10th ser.) 144. Decree of March 22, 1852, 9 *id.* 753, art. 8.

[74] See, e.g., Comments Holleaux [1959] Recueil Dalloz, Jurisprudence 378, 508.

[74a] See Cinquièmes Journées de Droit Franco-Latino-Américaines, Sept. 27, 1956, 9 Revue Internationale de Droit Comparé 206 (1957); Journées d'Etudes of May 18, 1957 of the Comité Français de Droit International Privé, 46 Revue Critique de Droit International Privé 352, 355 (1957).

given. Thus, room is left for annotations going into the "reasons." There is no "majority opinion" in the ordinary sense of the word to which a "dissenting opinion" could be added easily. What is hidden is who voted for and who voted against the result.

Traditional fear of a "Government of Judges" and belief in the supremacy of Parliament, practically removed until recently from discussion in France any possibility of judicial review of the constitutionality of legislation.[75] With the advent of the monocratic Constitution of 1958, the situation seems to have changed. The powers of Parliament having been trimmed, the question is asked how the powers of the Executive will be checked and balanced.[76] In the new Constitution, provision is made for a Constitutional Council composed of nine members which shall pass on questions of constitutionality submitted to the Council by the President of the Republic, the Prime Minister, or the presidents of the two houses.[77] The Constitution does not say that the decisions of the Council shall be under the system of secrecy. An organic law regulating the procedure of the Council, passed by the Government on the basis of special powers, has included in the text of the oath for the Council members the duty to maintain secrecy for both the deliberation and the vote.[78] Testing of the new regime has still to come.

The introduction of the Napoleonic codes in the Netherlands, Belgium, Italy, and other places led to adoption, at the same time, of the system of secret deliberation where it was not yet in operation. In the Netherlands, secrecy for the deliberation is prescribed by a provision in the Judicial Code of 1827.[79] Violators of the rule are subject to disciplinary sanctions.[80] In Belgium, a statutory basis for the system is lacking, but the principle is considered part of the public law in force.[81] In Italy, the codes of civil and criminal procedure prescribe secret deliberation in chambers.[82] When, after the last war, the Constitutional

[75] See 3 Glasson, Tissier and Morel, Traité de Procédure Civile 27 (3rd ed. 1929). But see André and Suzanne Tunc, Le Droit des États-Unis d'Amérique—Sources et Techniques 114 (1955). For an early support of the open vote, see 2 Boncenne, Théorie de la Procédure civile 398 (1839).

[76] See Paul Bastid, "Les principes généraux de la nouvelle Constitution française," 11 Revue Internationale de Droit Comparé 334 (1959); J. de Soto, La loi et le règlement dans la Constitution du 4 octobre 1958, [1959] Revue du Droit Public 240, 289.

[77] Constitution of 1958, art. 61.

[78] Decree No. 58–1067 of Nov. 7, 1958, art. 3, J. O. Nov. 9, p. 10129, as amended by Decree No. 59–223 of Febr. 4, 1959, J. O. Febr. 7, p. 1683.

[79] Wet op de Rechterlijke Organisatie, of April 18, 1827, [1827] Staatsblad No. 20, art. 28.

[80] See art. 11 (4) (d), as amended.

[81] See article "Jugements et Arrêts," §§ 175, 176, in 7 Répertoire pratique du Droit Belge 333 (1936). *Cf.* Cass. Belge, 2d Ch., June 14, 1858, [1858] Pasicrisie Belge I 261 (case where a judge refused to sign).

[82] Code of Civil Procedure of 1942, art. 276 (formerly, art. 358 of Code of 1865); Code of Criminal Procedure of 1930, art. 473 (5). *Cf.* Appeal Catania, Jan. 30, 1880, 32 Giurisprudenza Italiana, Raccolta 2. 542, quoted in Mortara, Sentenza (civile), § 160, 32 (2) Digesto Italiano 498 (1891) (case where a judge refused to sign).

Court was created and the rules for the Court were discussed in Parliament, the suggestion was made to put an identical provision into the rules,[82a] similar to the one in the rules of 1907 for the Council of State.[83] As adopted, the provision, however, merely prescribes deliberation in chambers.[84] The judgment published is the "opinion of the Court," and dissents, if any, are not revealed.

The French area of influence extended to the Mixed Courts in Egypt where the system of secrecy was followed.[85] It was, and still is, applied in Morocco in the so-called European courts. The results it can produce on occasion may be illustrated by a case before the former international tribunal of Tangier when that Moroccan city was under international administration. In 1953, a Moroccan sued an American corporation in the international tribunal. Claiming that, on the basis of old treaties and the most-favored-nation clause, American citizens may be sued only before the United States Consular Court, the corporation challenged the jurisdiction of the tribunal. This very question of United States extraterritorial rights in Morocco had been decided shortly before by the International Court of Justice in a proceeding between France and the United States, not for the Tangier Zone but for the Zone which then was under French protectorate. By a majority, the World Court had decided against the existence of extraterritorial rights of the United States in the French protectorate.[86] In the case before the Tangier tribunal, the tribunal was composed of a French, a Dutch, and a Swedish judge. With the same argument that the majority of the World Court had used, the tribunal decided the case against the American corporation. An appeal was made to the Tangier appellate court. That court, sitting with a Spanish, an Italian, and a Belgian judge, reversed the decision. The arguments of the minority of the World Court were used.[87] Because of the secret of the deliberation, it has not become known who voted for and who voted against in the first instance and

[82a] See Battaglini and Miniuni, Manuale legislativo della Corte Costituzionale 174 (1957).

[83] Art. 64 of the Rules of 1907 has a cross reference to the provision in the Code of Civil Procedure.

[84] Law of March 11, 1953, No. 87, art. 16 (3); Rules of the Court of March 24, 1956, art. 18.

[85] See J. Y. Brinton, The Mixed Courts of Egypt 142 (1930).

[86] Case concerning Rights of Nationals of the United States of America in Morocco (France v. U.S.A.), [1952] I. C. J. Reports 176. The vote was seven to four, three judges filing a dissenting opinion. Art. 57 of the Statute of the International Court of Justice provides: "If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion." On the history of art. 57, see Hudson, International Tribunals (1944) 116, and the recent article, Edward Hambro, "Dissenting and Individual Opinions in the International Court of Justice," 17 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 229 (1956).

[87] The case against the Mackay Radio & Telegraph Co. is noted in 49 Am. J. Int'l L. 267 and 413 (1955). See Nadelmann, "American Consular Jurisdiction in Morocco and the Tangier International Jurisdiction," 49 *id.* 506.

on appeal. We do not know whether the secrecy has added to the "authority" of the court. May we note for the record that the United States Government, which was not a party to the suit, soon after the decision formally relinquished its controversial extraterritorial rights for all parts of Morocco? [88]

The status of the law in modern Germany and Austria remains to be considered. According to a report made in 1875 before the Judiciary Committee of the German Reichstag, two systems prevailed in the German states: (1) absolute secrecy of the deliberation, as in Prussia, and (2) keeping of secret minutes of deliberation and vote, as in Württemberg.[89] The latter system was applied in Austria also.[90] It has, to this day, remained the Austrian system.[91] It is applied also in the Austrian Constitutional Court which was created under the Constitution adopted after the first World War.[92] Dissents are not made known.[93]

Under the system of absolute secrecy, in some German states a dissenting judge was allowed to add a written dissent to the part of the court record not accessible to the public. He could do so in Prussia,[94] where such filing was necessary to protect the dissenter from possible suits directed against the entire court for wrongful judgment—an action available under a mediaeval remedy called syndicate action.[95] While, in Prussia, the dissents were not made available to the public, in Baden lawyers had free access to dissents filed.[96]

In the Reichstag committee deliberating on the Judicial Code for unified Germany, a strong plea was made for allowing a dissenter to disclose his vote. Among other things, the English experience was

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[88] Note of Oct. 6, 1956, 51 Am. J. Int'l L. 466 (1957).

[89] See Gaupp in: Protokolle der Justizkommission des Deutschen Reichstages betr. die Beratung des Gerichtsverfassungsgesetzes und des Einführungsgesetzes, 92d session, Oct. 20, 1875, p. 63 (1876).

[90] Code of Criminal Procedure of 1873, §§ 45 (2) and 272. *Cf.* Decree of May 3, 1853, [1853] R.G.Bl. No. 81, § 50.

[91] Jurisdiktionsnorm-Gesetz of Aug. 1, 1895, § 14. Code of Civil Procedure of 1895, § 219. Geschäftsordnung für die Gerichte erster und zweiter Instanz, §§ 120, 121. Fasching, Kommentar zu den Zivilprozessgesetzen, Jurisdiktions-Norm, § 14, note 11, p. 192 (1959).

[92] Law of July 13, 1921, B.G.Bl. No. 364, § 28 (10); Law of 1930, as amended 1947, B.G.Bl. No. 132, § 29 (2). Rules of the Constitutional Court, Nov. 18, 1921, B.G.Bl. No. 653, § 41; Rules of Oct. 3, 1946, B.G.Bl. No. 202, § 36.

[93] *Cf.* Spanner, "Zur richterlichen Prüfung von Gesetzen und Verordnungen," 3 Oesterreichische Zeitschrift für Oeffentliches Recht 30, 85 (1951).

[94] Allgemeines Landrecht of 1794, Part II, Tit. 10, § 144. *Cf.* Allgemeine Gerichtsordnung of 1793, Part III, § 18. See 2 Dernburg, Lehrbuch des Preussischen Privatrechts 841 (2d ed. 1880); 2 Foerster, Theorie und Praxis des heutigen gemeinen Preussischen Privatrechts 478 (3rd ed. 1873). *Cf.* Döhring, Geschichte der deutschen Rechtspflege seit 1500 (1953) 255, note 182.

[95] References in 2 Windscheid, Lehrbuch des Pandektenrechts, § 470, note 1, p. 1048 (9th ed. by Kipp 1906).

[96] Dr. Grimm, in Protokolle, *op. cit. supra* note 89, at 62.

referred to.[97] The move failed.[98] While the Judicial Code lacks a provision imposing secrecy for judges,[99] keeping the secret is considered part of the judges' professional duty. No provision says that a dissenting opinion may be left with the court files. The German Supreme Court, the Reichsgericht, took it upon itself, for its own court to embody such right in its Rules of Court.[100] The successor to the Reichsgericht, the Bundesgerichtshof of the Bonn Constitution, has done likewise.[101] How often dissents are filed, in view of the secrecy covering the whole operation, is not known. A member of the Reichsgericht—he sat in criminal cases—recently revealed that, in sixteen years, he had used the right twice.[102] It is interesting that this right—or opportunity—has been codified in Eastern Germany for criminal proceedings.[103] Soviet Russian Codes seem to have a like provision.[104]

The Bonn Constitution has provided Western Germany with a special Constitutional Court.[105] The question arose—and it was debated heatedly in Parliament in the judicial committees of both houses—whether, in the Constitutional Court, dissenting judges should have the right to disclose their vote. They had been forbidden to do so in the Constitutional Court created by the Weimar Republic.[106] The move to allow disclosure of dissents was lost by a small margin.[107] A majority felt that "the trust in justice and, especially, constitutional justice, was not sufficiently developed with the Germans to preclude possible public

[97] Eduard Lasker, *id.* at 55, 59 to 61.

[98] See Von Mehren, The Civil Law System 834, note 53 (1957). The proposal was rejected on the ground "that it was incompatible with the authority of the courts and the good relations between the judges; that a court's principal function was to decide the individual case justly and to uphold the authority of the laws, not to provoke scientific discussions over legal questions." Bericht der Kommission 72 in Hahn, Die gesamten Materialien zu dem Gerichtsverfassungsgesetz 984 (2d ed. 1883).

[99] See 2 Loewe and Rosenberg, Kommentar zur Strafprozessordnung und zum Gerichtsverfassungsgesetz, GVG § 194, note 5 (a) (20th ed. 1956). *Cf.* Braun, "Richterhaftung und Beratungsgeheimnis," 46 Juristische Wochenschrift (1917) 132, 133.

[100] Geschäftsordnung des Reichsgerichts § 15, [1880] Zentralblatt f. d. Dt. Reich 190, [1886] *id.* 300. The Rules of the precursor court, the Bundes-Oberhandelsgericht, had provided that there shall be no minutes taken of deliberation and vote. Regulativ für den Geschäftsgang bei dem Bundes-Oberhandelsgericht, of 1871, § 21 (2), 2 Entscheidungen des Bundes-Oberhandelsgerichts 7 (1871).

[101] Geschäftsordnung des Bundesgerichtshofs, March 3, 1952, Bundesanzeiger No. 83 of April 30, 1952, § 10. 5 Wieczorek, Zivilprozessordnung und Nebengesetze 314 (1957).

[102] Fritz Hartung, "Aus der Werkstatt des Reichsgerichts," 4 Süddeutsche Juristen-Zeitung 306, 311 (1949). For a disclosure of the voting (unanimity), see Hartung, "Der 'Badewannenfall,'" [1954] Juristen-Zeitung 430, 431; Schorn, Der Richter im Dritten Reich (1959) 123.

[103] Code of Criminal Procedure of 1952, § 92 (2), [1952] G.Bl. 1004, See Loewenthal, "Der neue Strafprozess-Allgemeine Bestimmungen," [1952] Neue Justiz 469, 471.

[104] Code of Civil Procedure of 1923, § 174. Code of Criminal Procedure of 1922, § 325.

[105] Bonn Constitution of 1949, art. 92, 93, 94.

[106] Rules of the Constitutional Court of Sept. 20, 1921, §8 (2), [1921] R.G.Bl. 1535.

[107] References in Willi Geiger, Gesetz über das Bundesverfassungsgericht vom 12. Mai 1951 (1952) 66; Hans Lechner, Bundesverfassungsgerichtsgesetz 173 (1954); von Mangoldt, Das Bonner Grundgesetz, note 5 to Art. 94, page 516 (1953).

reactions, at once unpleasant and dangerous for the institution itself, if, in litigation involving political issues, a judge himself asserted that the question could have been decided the other way."[108] The statute prescribes deliberation in secret.[109] It does not say whether dissents may be filed with the secret court record. In a case involving an advisory opinion—not a judgment—of the Constitutional Court, a member filed a dissenting opinion, and the opinion was made public.[110] The same has taken place in the Bremen State Constitutional Court.[111] In Bavaria, under the Rules of the Bavarian Constitutional Court, members may announce their dissent, and the dissenting opinion is published, but without the name of the dissenter.[112] The president of that court stated in an address that the practice led to no inconvenience and, especially, to no impairment of the authority of the court.[113] The president later became the president of the Constitutional Court. The issue of secrecy of the vote is much debated, occasionally heatedly, and the preparation of a new Basic Law for the Judiciary has added to its actuality. Criticisms of the present system have multiplied,[114] but answers have come from the traditionalist[115] side. Maintenance of "the authority" of the court is the principal theme pressed by those opposed to a change. In the published discussions, little difference is made between the courts in general and the highest courts and the Constitutional Court in particular. Political factors seem to play a role. Post-war events, it should not be overlooked, have brought to the German people

[108] As translated in von Mehren, "The Judicial Process: A Comparative Analysis," 5 Am. J. Comp. L. 197, 208, note 42 (1956); von Mehren, *op. cit., supra* note 98, at 834, note 53.

[109] Law on the Constitutional Court, of May 12, 1951, art. 30.

[110] Decision of Full Bench, Dec. 8, 1952, 2 B. Verf. G. Entsch. 79, [1953] Juristenzeitung 35.

[111] Decision of Jan. 5, 1957, [1957] Juristenzeitung 542, [1957] Neue Juristische Wochenschrift 666. See Amram, "The Dissenting Opinion Comes to the German Courts," 6 Am. J. Comp. L. 108 (1957); Cohn, "Dissenting Opinions in German Law," 6 Int'l & Comp. L. Q. 540 (1957).

[112] Rules of the Bavarian Constitutional Court, May 24, 1948, [1948] Ges. & Verordnungsblatt 121, §§ 7(a), 8(6). Which decisions shall be published is decided by the court. See Bavarian Constitutional Court, July 15, 1949, [1949] Entsch. des Bayer. Verwaltungsgerichtshofs und des Bayer. Verfassungsgerichtshofs 98, 102.

[113] President Wintrich, in an address, Nov. 26, 1957, according to Joseph H. Kaiser, "Zum Konkordatsurteil des Bundesverfassungsgerichts," 18 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 526, 556, note 135 (1958).

[114] Listed in Schmidt-Räntsch, "Gegenstand, Sinn und Grenzen des Beratungsgeheimnisses," [1958] Juristenzeitung 329, are: Scheuerle, 68 ZZP 817 (1955); Beyer, [1953] NJW 654; Eb. Schmidt, "Politische Rechtsbeugung und Richteranklage," in Justiz und Verfassung 55, 90 (1948); Eb. Schmidt, Lehrkomm. zur STPO, Part I (1952) 235; Kohlhaas, [1953] NJW 401; Spendel, 65 ZStrW 403 (1953). Adde: Geiger, *op. cit., supra* note 107; von Mangoldt, *op. cit., supra* note 107; Baumbach, ZPO, Preface to GVG § 192 (18th ed. 1947) ("whether secret deliberation and vote are an advantage is a question"); Baumbach and Lauterbach, ZPO (24th ed. 1956) (same); Schätzel, 78 AöR 228, 236 (1953); Wagner, [1958] JRd 281, 286; Kaiser, *loc. cit., supra* note 113; Bachof, 11 DOEV 512 (1958); Adam, [1959] NJW 1302, 1304.

[115] See Schmidt-Räntsch, *loc. cit., supra* note 114, and references therein.

wide acquaintance with what some debaters like to call the "alien" system.[116] Indeed, on some mixed and international courts, German judges have made full use of the right to make their individual vote known.

Passing in review some of these tribunals, in the War Crime Trials announcement of individual opinions was allowed and made use of, as will not be forgotten. The same practice was followed in some of the Restitution Courts.[117] It is applied in the arbitral courts set up under the London Claims Agreement.[118] On the other hand, the European nations which set up the European Coal and Steel Community chose the system of secret deliberation and vote for the High Court of the Community.[119] The system is to continue for the successor court, the Court of Justice of the European Communities.[120] The merits of the system of secrecy were questioned recently by the German member of the High Court: "That the minority of the judges could not add its dissenting opinion to the judgment, appeared to be regrettable on occasion. Knowledge whether a decision was unanimous or, possibly, by a vote of four to three, often would have been of value to the parties and, in particular, the High Authority which is anxious to keep in mind for its future actions the rulings of the Court."[121] For the European Court of Human Rights, the Council of Europe's child, the right for the dissenter to state his dissent publicly has been codified.[122]

From what side, or sides, comes support today for concealment of the result of the vote on the highest courts? Is it the judges? Has a poll of the judges ever been taken? Writing in 1821, Anselm von Feuerbach seems to have had that possibility in mind by suggesting that, in that case, the thing to do was to return to the practice of the old Areopagus which sat as court during the night only and without any light. "As darkness was to hide the parties from the judges of the

[116] For a pre-war presentation by an American of the American system, see Llewellyn, Präjudizienrecht und Rechtsprechung in Amerika 58 (Leipzig, 1933).

[117] United States Court of Restitution Appeals, Rules of Court, R. XXVIII, 5 Reports of the Court 599 (1955); Supreme Restitution Court, Rules of the Third Division, R. XXVI, 61d. 401 (1956).

[118] Convention of Febr. 27, 1953, Rules of Procedure of the Arbitral Tribunal, art. 44 (c). Text in 19 Zeitschrift für ausländisches öffentliches und Völkerrecht 728 (1958). Judgment of the Tribunal of July 3, 1958, Switzerland v. Germany, 19 *Id.* at 761 (1958); 201d. 160, 166 (1959).

[119] Treaty of April 18, 1951 on the European Coal and Steel Community, art. 29, 46 Am. J. Int'l L. Supp. 107 (1952).

[120] Court of Justice established by Treaty of March 25, 1957, art. 164, and convention of same date, art. 3, 4 European Yearbook 413 (1958), 51 Am. J. Int'l L. 865, 1000 (1957). Statute of the Court of Justice, April 17, 1957, art. 2, 5 European Yearbook 571 (1959).

[121] Otto Riese, "Erfahrungen aus der Praxis des Gerichtshofs der Europäischen Gemeinschaft für Kohle und Stahl," 36 Deutsche Richterzeitung 270, 273 (1958).

[122] European Convention for the Protection of Human Rights and Fundamental Freedoms, of Nov. 4, 1950, art. 5 (2), Council of Europe, European Treaty Series No. 5, 1 European Yearbook 317 (1955).

Areopag, in our court it would at least serve the purpose of hiding from the parties judges who shy from the light."[123] Piero Calamandrei, in the postwar edition of his "Eulogy of Judges," probably was closer to today's problem by terming the secret of discussion and vote in chambers "an institutional consecration of conformity, a typical example of State unanimity which saves appearances at the expense of conscience."[124] Strange fear of possible power of a dissent is revealed occasionally. "The dissenter should not be allowed to rally public opinion," a French prosecuting attorney wrote some fifty years ago.[125] It would seem that, even if abused, a dissent never can endanger political institutions to the same extent as daily political demagogy over the press and radio may do. For along with the dissent comes the majority opinion—people at the same time get both sides of the story. That is how democracy works or is supposed to work.

Public control of the courts is weakened if dissents are hidden. "It is through publicity alone," Bentham said, "that justice becomes the mother of security."[126] Disclosure of the vote forces each member of the court to take his responsibility and justify the position he takes before his colleagues, the parties, and the public in general. The right to dissent and say so is "a powerful stimulus to the maximum effort of which a tribunal is capable"[127]—we do not think that anyone with court experience can disagree. The right to speak is the "fortress of the personality of the free judge."[128]

This leads us to the ultimate question raised at the start, the relation if any between our topic and "The Rule of Law." In answer, we should like to quote a passage in an address by a present member of the United States Supreme Court. Said Associate Justice William O. Douglas some ten years ago:[129]

> "Certainty and unanimity of the law are possible both under the fascist and communist systems. They are not only possible; they

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[123] 1 Feuerbach, *op. cit. supra* note 2, at 145. *Cf.* Mittermaier in 3 Archiv für die civilistische Praxis 289, 301 (1820). Today's highest court of Greece, the Areopag, follows the principle of secrecy. For the lower courts, the Code of Civil Procedure of 1834, art. 177, provides that the minority of the court may ask to have its view noted in the decision as a point of doubt. Minutes not available to the public are kept of deliberation and vote. (We are indebted to Professor Maridakis for this information.)

[124] Calamandrei, Elogio dei Giudici scritto da un avvocato 274 (3rd ed. 1955) (German trans. by Hinterhäuser, Munich 1956).

[125] Baudouin, *loc. cit. supra* note 63, at 52.

[126] Bentham, Draught for the Organization of Judicial Establishments, in 4 Bentham, Works 305, 317 (Bowring ed. 1843).

[127] Lauterpacht, Development of International Law by the International Court 66 (1958).

[128] "Citadelle der freien Richterpersönlichkeit." Ernst J. Cohn, Der englische Gerichtstag 64 (1958).

[129] Douglas, "The Dissent: A Safeguard of Democracy," Address before the ABA Section of Judicial Administration, Seattle, Wash., Sept. 8, 1948, 32 J. Am. Judicature Soc. 104, 105 (1948). *Cf.* Harlan F. Stone, "Dissenting Opinions are Not Without Value,"

are indispensable; for complete subservience to the political regime is a sine qua non to judicial survival under either system. One cannot imagine the courts of Hitler engaged in a public debate over the principles of Der Führer, with a minority of one or four deploring or denouncing the principles themselves. One cannot imagine a judge of a communist court dissenting against the decrees of the Kremlin . . .

"We must expect of judges the fortitude and courage that we demand of all other servants who man our public posts. If they are true to their responsibilities and traditions, they will not hesitate to speak frankly and plainly on the great issues coming before them. They will prove their worth by showing their independence and fortitude. Their dissents or concurring opinions may salvage for tomorrow the principle that was sacrificed or forgotten today."

And such a conservative personality as Charles Evans Hughes, drawing on his extraordinary double experience as a member of the Supreme Court and Secretary of State, had no hesitation, in balancing the advantages and disadvantages of the open vote, to say:[130]

"There are some who think it desirable that dissents should not be disclosed as they detract from the force of the judgment. Undoubtedly they do. When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence. But unanimity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect upon public opinion at the time. This is so because what must ultimately sustain the court in public confidence is the character and independence of the judges. They are not simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity could be secured through its sacrifice. . . . A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."

"The voice of the majority," said Judge Cardozo in his Yale lecture on Law and Literature,[131] "may be that of force triumphant, content

26 *id.* 78 (1942). But see Learned Hand, The Bill of Rights 72 (1958): "[D]isunity cancels the monolithic solidarity on which the authority of a bench of judges so largely depends. . . . The reasoning of both sides is usually beyond their [the peoples'] comprehension, and is apt to appear as verbiage designed to sustain one side of a dispute that in the end might be decided either way, which is generally the truth."

[130] Hughes, The Supreme Court of the United States 68 (1928, 1937 reprint).

[131] Cardozo, "Law and Literature," 14 Yale Review (N.S.) 689, 715 (1925), reprinted

with the plaudits of the hour, and recking little of the morrow. The dissenter speaks to the future, and his voice is pitched to a key that will carry through the years. Read some of the great dissents, the opinion, for example, of Judge Curtis in Dred Scott v. Sanford,[132] and feel after the cooling time of the better part of a century the glow and fire of a faith that was content to bide its hour. The prophet and the martyr do not see the hooting throng. Their eyes are fixed on the eternities."

Happily, views such as these have not been lost in the secret of the *Chambre du Conseil* or buried in a secret *Protokoll* or file.

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in Cardozo, Law and Literature and other Essays and Addresses 36 (3rd print 1934). Referred to, e.g., in Jackson, The Supreme Court in the American System of Government 19 (posthum. ed. 1955).

[132] Dred Scott v. Sandford, 60 U.S. 393, 564 (1856). One may add Justice Harlan's dissent in Plessy v. Ferguson, 163 U.S. 537 (1896), overruled in Brown v. Board of Education, 347 U.S. 483 (1954).

GEORGE NEBOLSINE

The "Right of Defense" in the Control of Restrictive Practices Under the European Community Treaties

The supra-national control of restrictive business practices and concentrations provided for in the European Economic Community Treaty which came into effect in 1958[1] marks a new and important expansion of regulatory laws in this field.

Business both in the Six[2] member countries and outside of the European Community whose dealings bring them within the jurisdiction of the EEC Treaty are compelled to appraise the effect of this Treaty upon their plans and activities.

Articles 85 to 90 under the title "Rules Governing Competition" contain many new and unfamiliar features. Their scope is open to speculation and the exact role of the Community agencies and their implementation is as yet undetermined.

The Commission created by the Treaty to act as the principal executive authority of the Community is given certain quasi-judicial functions in the enforcement of these rules. It has in turn set up a special subcommittee on Competition composed of three members of the Commission,[3] and in the administration there has been created a special division or bureau entitled "Understandings, Monopolies, Dumping and Discrimination" under Mr. Verloren van Themaat, formerly administrator of the Dutch agency dealing with restrictive practices.

The machinery of the Community includes a Council authorized to promulgate Regulations governing the application of these Rules[4] and a multi-national Court of Justice to hear appeals from the Commission's decisions with power to annul them if they violate the Treaty or any rule of law relating to its application and to hear cases brought by member states.[5]

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[1] Treaty establishing the European Economic Community. Official translation (hereinafter referred to as EEC Treaty).

[2] The "Six" is a term commonly employed to designate the six member countries of the European Economic Community: France, Germany, Belgium, Holland, Luxembourg, and Italy.

[3] EEC Commission, First General Report, January 1, 1958—September 17, 1958.

[4] *Ibid.*, Article 145 *et seq.*

[5] *Ibid.*, Article 164 *et seq.* The Court's Rules were promulgated in 2 Journal Officiel des Communautés Européennes No. 18, 21 March 1959.

These provisions, however, leave many legal uncertainties, which coupled with the undeniable difficulties inherent in the regulation of business practices on so vast a scale as the EEC Treaty envisages, had led to the suggestion that the Rules should not go into operation until the regulations under the Treaty had been laid down and the role of national enforcement had been further clarified.[6] However, the President of the Commission, Dr. Hallstein, has since indicated that steps are to be taken to implement the Treaty and that its clauses are indeed operative, and the Committee of governmental experts set up by the EEC Commission to examine these questions has supported this view.[7] While this question will have to wait decision by the final authority, the Court of Justice, the following observations are made subject to this determination.

The enforcement of the Rules will raise questions of procedure and in particular of the procedural safeguards afforded by the Treaty in respect to the Commission's role as quasi-judicial fact finder and decision maker in the enforcement of the Rules.

Our examination of the problems of procedure will start with a brief review of the history of attempts to regulate restrictive practices by international agencies.

I. International Restrictive Practice Legislation

The national legislations of the Six member countries show little consistency in their definitions and treatment of restrictive business practices. Two of the member states, Germany and the Netherlands, have legislation directed at both restrictive practices and concentrations.[8] France has an attenuated law directed at freedom of competition in pricing.[9] Each of these three countries, however, authorize certain types of restrictive agreements in industry, whose characteristics differ. The remaining three of the Six member countries have no special legislation addressed to cartels or concentrations.

In the field of international control, the first approach in any international agreement of the cartel problem was in the Havana Charter,[10] which, however, failed of adoption. The announced object of introducing anti-cartel provisions in this Treaty was to supplement the long-

[6] International Chamber of Commerce. Resolution of Commission on International Business Agreements affecting Competition, XVIIth Congress, 1959, Resolutions II, 3, 4 and 5. Legal opinions on this question were expressed in Strickrodt, Betrieb, Supp. 9/57 to part 26/57; Spengler, 8 Wirtschaft und Wettbewerb (1958) 73, 461; Gemeinschaftskommentar, Supp. to Para. 101, 3, Points 7 and 8; Moehring, Neue Juristische Wochenschrift (1959) 378.

[7] First General Report—EEC. September 17, 1958, 65. CEEC Information Service 1: (59) 2. January 20, 1959.

[8] See Part VI of this paper.

[9] *Ibid.*

[10] The Havana Charter. Publication of the Department of State (1947), No. 3117.

term objective of the Treaty to reduce trade barriers. It was urged that such reduction would be incomplete if the barriers to international trade created by certain kinds of business practice were not also dealt with.[11] The sponsorship of the anti-cartel provisions in the Havana Charter was primarily American, and the draftsmanship of the clauses reflects American rather than European practices.[12]

The Havana Charter provisions fall into three essential parts:

1. A list of restrictive practices and a definition of the harmful effects that would make them subject to condemnation.[13]

2. A procedure for investigations and for adjudication in individual cases.[14]

3. Machinery for securing compliance with the recommendations and decisions of the Organization.[15]

Another effort at international legislation to curb restrictive business practices, closely modelled on the Havana Charter, was the draft treaty prepared under the auspices of the Economic and Social Council of the United Nations,[16] but this draft treaty also failed of adoption.

Meanwhile the Coal and Steel Community Treaty of 1951 had been ratified. This Treaty, applicable to the same countries as the recent EEC Treaty, contains clauses curbing restrictive business practices and concentrations.[17] The EEC Treaty derives its machinery and terminology largely from the ECOSOC draft and from the Coal and Steel Community Treaty. A comparative examination of the two European Treaties on the one hand and the Havana Charter and the ECOSOC

[11] The Havana Charter for an International Trade Organization, Restrictive Business Practices, Department of State Bulletin, Vol. 22, January-June 1950, 760.

[12] The Havana Charter text follows closely the prohibitions in typical American Consent Decrees.

[13] Havana Charter, Article 46. The debate between the proponents of making defined restrictive business practices illegal without reference to their "harmful effects" on the public interest (the American *per se* doctrine) and those who would require a finding of "harmful effects" has not been settled in respect to the European Economic Community Treaty clauses due to the curious wording of Article 85. There is a considerable literature on the controversy as to the proper interpretation of the European Economic Community Treaty clauses which does not immediately concern the topic of this paper.

[14] *Ibid.*, Article 48.

[15] *Ibid.*, Article 50.

[16] Draft Treaty on Restrictive Business Practices. Report of the Ad Hoc Committee on Restrictive Practices of ECOSOC. 16th Sess. (1953); Supp. No. 11, (Doc. No. E/2380) 11A (Doc. No. E 2379 Add. 1) and 11B (Doc. No. E 2379/Add. 2), E 2379 Add. 1 and E 2380.

In discussing the Havana Charter and the ECOSOC draft, the Report of the Ad Hoc Committee states:

> "The question whether these practices had harmful effects upon the expansion of production or trade in the light of stated objectives would be determined in each instance in accord with the procedures set forth in the draft agreement. There is thus no presumption in the draft agreement that the practices listed in paragraph 3 have harmful effects. Only where harmful effects were established would the draft agreement provide for any remedial action to be taken." p. 3.

[17] European Coal & Steel Community Treaty (ECSC), Chapter VI.

draft on the other gives a singular insight into the evolution of thinking of the authors of these provisions to the present time.

II. The European Community Treaties

The two European Treaties use the same Court of Justice, but have separate executive authorities: the High Authority for the Coal and Steel Community, the Commission for the European Economic Commission for the European Economic Community. While their scope differs importantly in the control of concentrations and mergers, their control over restrictive practices is quite similar.

1. *Restrictive practices.* Both Treaties prohibit three types of restrictive practive (among others) under stated conditions: price fixing, restriction of production and technology and allocation of markets.[18] In addition, the EEC Treaty outlaws discrimination resulting in competitive disadvantage and tying agreements.[19]

2. *Qualifying Clause.* Both Treaties mitigate these prohibitions by a qualifying clause. A showing of harmful effects of the practices upon trade within the Common Market is required. The EEC Treaty attacks practices "which are likely" (prejudicially)[20] to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market."[21] The qualifying clause in the ECSC Treaty reads:

> "tending, directly or indirectly, to prevent, restrict or distort the normal operation of competition within the Common Market."[22]

3. *Provision for exemption of "good cartels."* Restrictive agreements having the desirable characteristics defined in the Treaty may be exempted.[23] Such exemption is common to the jurisprudence of all municipal European legislation in this field.

4. *Provisions governing concentration.* The EEC Treaty declares incompatible with the Treaty any prohibited actions to take improper advantage of a dominant position within the common market or within a substantial part of it adopting improper practices, such as inequitable pricing, limitation of production to the prejudice of con-

[18] ECSC Treaty Article 65, EEC Treaty Article 85, 1(a), (b), (c).

[19] EEC Treaty Article 85, 1(d) and (e). Article 4 of the ECSC Treaty prohibits "practices discriminating among producers, among buyers, or among consumers, especially as concerns prices, delivery terms and transport rates, as well as measures or practices which hamper the buyer in the free choice of his supplier; . . ."

[20] The German, Italian and Dutch texts differ from the French text which uses the word "affecter," the German text uses "beeinträchtigen," the Italian "pregiudicare," the Dutch "ongunstig kunnen beïnvloeden," which mean "prejudice," not "affect." The official English translation follows the French "affecter." Four-language edition of the European Economic Community Treaty. Bundesgesetzblatt, Teil II, No. 23 (1957).

[21] EEC Treaty, Article 85(1).

[22] ECSC Treaty, Article 65(1).

[23] EEC Treaty, Article 85(3), ECSC Treaty, Article 65(2).

sumers, discriminations resulting in a competitive disadvantage, and tying arrangements "to the extent to which trade between any Member States may be (prejudicially)[24] affected thereby."[25]

The Coal and Steel Community Treaty's approach to this problem is different. Mergers and other forms of acquisition leading to "concentration" are regulated. There is no mention of mergers in the EEC Treaty. Authorization for mergers in coal and steel will be granted if the High Authority finds that the transaction shall not give the enterprise power to determine prices, restrict production or to prevent competition and shall not establish it in a "privileged prosition involving a substantial advantage in access to suppliers or markets."[26] The High Authority is also empowered to make "recommendations" to enterprises having a "dominant position" to prevent the use of such position for purposes contrary to those of the Treaty.[27] If these recommendations are not carried out, it may by a prescribed procedure fix prices and conditions of sale and draw up production or delivery programs for such enterprise.

5. *Investigation and Adjudication.* The EEC Treaty directs the Commission to

> "investigate, in conjunction with the competent authorities of the Member States which shall lend it their assistance, any alleged infringements of the above-mentioned principles. If it finds that such infringement has taken place, it shall propose appropriate means for bringing it to an end."[28]

The EEC Treaty states:

> "If such infringement continues, the Commission shall, by means of a reasoned decision, confirm the existence of such infringement of the principles. The Commission may publish its decision and may authorise Member States to take the necessary measures, of which it shall determine the conditions and particulars, to remedy the situation."[29]

The Coal and Steel Community Treaty applied a different approach by retaining strong remedial measures in the hands of the High Authority.[30]

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[24] See note 20.
[25] EEC Treaty, Article 86.
[26] ECSC Treaty, Article 66(2).
[27] *Ibid.*, Article 66(7).
[28] EEC Treaty, Article 89(1).
[29] *Ibid.*, Article 89(2).
[30] The ECSC Treaty states in Article 65(4):

> "The High Authority shall have exclusive powers, subject to appeals to the Court, to rule on the conformity of such agreements or decisions with the provisions of this article"

and further states that any agreement prohibited by the Treaty is void and "may not be invoked before any court of the member States" (Art. 65(4)). It also is empowered

The reference of cases for enforcement to member states in the EEC Treaty is apparently derived from the Havana Charter and the ECOSOC draft alluded to above.[31] Practical questions arise nonetheless, as to the meaning to be given the clause providing that the Commission determine the conditions and particulars of such enforcement. It is precisely the reference of cases to the member states, each of which has a different view of restrictive practices and concentration, that met with severe criticism in connection with the ECOSOC draft treaty.[32]

6. *Appeal.* The Commission's decisions like those of the High Authority of the Coal and Steel Community are subject to annulment by the Court of Justice on the grounds specified in the Treaties.[33] There was no appeal in either the Havana Charter or the ECOSOC draft treaty from the decisions of the organization set up under these drafts.

III. Importance of Procedural Rules

It is evident that the Commission under the EEC Treaty will be required to consider specific economic circumstances involving a wide range of different industries each with its own pattern and needs. Detailed consideration of complex industrial facts and economic data will have to be given in the process of interpreting the principles laid down in Articles 85 and 86, and in particular in granting exemptions under Article 85(3). The facts in cases of this kind are far more elusive and difficult to elicit than facts in the ordinary run of administrative law cases. Statistics and other forms of economic data are susceptible of many-sided analyses and the measuring of industrial performance to make a determination of "improvement of the production and distribution of goods," or "the promotion of technical or economic progress," or "the reserving to users [of] an equitable share in the profit resulting therefrom," tests contained in Article 86 of the EEC Treaty, involve highly complex evaluations. Under these circumstances the observation of the French jurist R. Odent in a monograph entitled "Les droits de la défense," published in the Journal of the Conseil d'Etat, is particularly cogent:[34]

> ". . . experience shows that errors of law . . . are less dangerous for those who are the subject of administrative action, than errors

to impose severe penalties for Treaty violations (Art. 65(5)). However, under Art. 66(6) in addition to taking all manner of severe measures, the High Authority is empowered to make recommendations to member states to obtain execution "within the framework of national legislation" of its measures. But note on the question of the Commission's role in these matters, Article 88, which requires Member States to rule on admissibility of agreements and upon the effect of a dominant position in the market under Articles 85 and 86 until the date of the entry into force of the provisions adopted by the Commission in application of Article 87.

[31] Havana Charter, Article 50; ECOSOC draft Article 5.

[32] This was the point most strongly made in the United States rejection of the draft.

[33] ECSC Treaty, Article 33, EEC Treaty, Article 173.

[34] Conseil d'Etat, Études et Documents (1953), 55.

> of fact; errors of law are, in general, easily rectified; errors due to an insufficient or incomplete knowledge of facts and particularly of the significance of facts relied upon by the judge, are on the contrary, difficult to avoid or are procedurally impossible to correct. . . . To eliminate the risk of errors of fact, the decision-maker has no better means than to seek the interested parties out, to have them state their version of the facts and to give to the decision-maker their point of view."

What are the procedures provided for in the EEC Treaty to effect justice and to afford the "right of defense" to those whose businesses and fortunes are at stake?

IV. Procedural Safeguards

1. *Hearings.* The decision making body in the various treaties we have reviewed is a "commission" type of body which is made responsible for deciding all questions of law and fact relating to concentrations and restrictive practices. Under the Havana Charter this body was termed the Organization. It was specifically required to "conduct or arrange for hearings on the complaint," to review all information available and to decide on the existence of the conditions and the effects defined in the Treaty.[35] Quite possibly this formulation, which is typically American, was proposed by the U. S. delegation. In any event, it does not reoccur in subsequent treaties. The formality of the "hearing" was diluted in the ECOSOC draft. In this draft the Organization investigates and determines as in the Havana Charter, but the clause on hearings is as follows:

> "*Article 3(5).* If the Organization decides that an investigation is justified, it shall inform all Members of the complaint, request any Member to furnish such additional information relevant to the complaint as the Organization may deem necessary, and shall subsequently afford any Member, and any person, enterprise or organization on whose behalf the complaint has been made, as well as the commercial enterprises alleged to have engaged in the practice complained of, *reasonable opportunity to be heard.*
>
> * * * *
>
> "*Article 15(3).* The director of the advisory staff shall arrange for opportunities to be given in accordance with paragraph 5 of article 3, for any Member or any person, enterprise or organization on whose behalf the complaint has been made, or any commercial enterprise alleged to have engaged in the practice complained of, *to be heard by the advisory staff; provided,* however that the Rep-

[35] Havana Charter, Article 48(4).

> resentative Body in its discretion may afford opportunities for such persons to be heard by it after it has received the report of the advisory staff."

Thus the ECOSOC draft permitted the Representative Body, its top policy making body, to delegate to its advisory staff the investigation of complaints, the preparation of reports on the facts together with an analysis of their effects and significance in relation to the objectives of the Treaty and delegate to this advisory staff the granting of the opportunity to be heard.

The ECSC Treaty contains no general requirement of affording interested parties even a limited opportunity for a hearing, except in connection with the prohibition by the High Authority of proposed concentrations under Article 66. In such cases it will act only "after allowing the interested parties to present their observations." In practice this means very little by way of a "hearing." The EEC Treaty, the last of the series, is wholly silent on this subject.

2. *Duty to weigh all evidence.* Both draft treaties provided that the Organization "shall review all information available and decide whether the conditions specified in [the Treaty] * * * are present."[36] There are no requirements along these lines in either of the European Treaties, but the ECSC Treaty specifies that "Decisions granting, modifying, refusing or revoking an authorization shall be published *together with the reasons therefor*"[37]; and that the decisions on concentration shall be by *reasoned decision.*"[38] The EEC Treaty in Article 89 also requires the Commission to act through a "reasoned decision."

What significance are we to attach to the silence of the EEC Treaty on the granting of an opportunity to be heard and to the need for weighing all evidence? Does this ommission compel a conclusion that in its procedure the Commission is free to disregard all "rights of defense" and all procedural safeguards in favor of the interested enterprise?

In seeking the principles of jurisprudence that should be applied in determining this question, we must in the first instance look to the provisions of the Treaty itself, particularly to the requirement of the Treaty that the Commission act by a "reasoned decision" and to the provision defining the errors that will result in the annulment of a decision.

In the second instance, we may consider the significance of the provision of the EEC Treaty providing for the enactment of regulations to define the respective responsibilities of the Commission and the Court of Justice in the application of the provisions referred to in this paragraph in regard to the following:

[36] Havana Charter, Article 48(5), ECOSOC draft, Article 3, 6.
[37] ECSC Treaty, Article 65(2).
[38] *Ibid.*, Article 66(5).

—The penalties to ensure observance of the prohibitions of Articles 85 and 86.

—The implementation of the power granted in Article 85(3) to exempt restrictive agreements from Article 85(1).

—Specification of the scope of application "in the various economic sectors" of Articles 85 and 86.

—Definition of the "respective responsibilities" of the Commission and the Court of Justice.

—Definition of the relation of municipal law to provisions of Articles 85 and 86.[39]

V. Principles of Administrative Law Applicable to the Commission under the EEC Treaty

An abundant and authoritative literature has already appeared on the procedure and jurisprudence of the Court of Justice of the Community.[40] This literature throws light upon the procedures that should govern the High Authority or the Commission, as the case may be, in the determination of facts and the application of law to those facts.

Legal principles governing standing of private parties under the Treaties. Commentators have expressed the view that the Court of Justice is not an international court but a court of the Community created by the Six.[41] This distinction is significant to the jurisprudence applicable to its procedure. Private parties have standing before the Court by virtue of their right to appeal in their own behalf and not as in the case of international courts, solely through their governments. As regards proceedings involving private parties before it, the source of law is in the national jurisprudence of the Six rather than in international law.[42] Since a right of appeal is afforded, it would seem to follow that private parties must be deemed to be entitled to a legal standing before the Commission in its quasi-judicial capacity in

[39] EEC Treaty, Article 87.

[40] Lagrange, "L'Ordre juridique de la C.E.C.A., ou à travers la jurisprudence de la Cour de Justice," 74 Rev. Dr. Pub. (1958) 53. The author is the Advocate General of the Court of Justice who presented the Assider v. H. A. case; see note 47.

[41] Lagrange, *op. cit.* n. 40.

[42] Reuter, "The Rule of Law of the European Coal and Steel Community," J. Droit, Int. (1953) No. 1, 13, who writes:

> ". . . the following provisions of the treaty pertain to national laws: all relations directly affecting commercial enterprises; in traditional international law and in diplomatic practice, private persons are not directly subject to international law; moreover the general type of rules concerning private persons included in the Treaty has had no equivalent in traditional international law but only in national law; it is thus natural to turn to the latter when interpreting these rules."

Jeantet, "Les intérêts privés devant la Communauté Européenne du Charbon et de l'Acier," 70 Rev. Dr. Pub. (1954) 687.

regard to restrictive practices and concentrations. This principle received recognition, in a narrow sense, in Article 66(5) of the ECSC Treaty, which, as we have specifically noted, gives such parties an opportunity to be heard in special cases.

What are the rights of persons affected? Since the EEC Treaty is silent on the subject of appearance before it and no regulations have yet been promulgated on the question of the rights of private parties before the Commission, we must turn for guidance to the principles of law governing the Treaty and in particular to the appellate provisions of the Treaty.

Commercial enterprises aggrieved by the decision of the Commission are authorized in Article 173 of the EEC Treaty to appeal to the Court of Justice ". . . on grounds of incompetence, of errors of substantial form, of infringement of this Treaty or of any legal provision relating to its application, or of abuse of power." The same grounds of annulment of decisions of the High Authority are contained in Article 33 of the Coal and Steel Community Treaty.

The ECSC Treaty contains the following clause, which is quite significantly omitted in the EEC Treaty:

> "However, the Court may not review the High Authority's evaluation of the situation, based on economic facts and circumstances, which led to such decisions or recommendations, except where the High Authority is alleged to have abused its powers or to have clearly misinterpreted the provisions of the Treaty or of a rule of law relating to its application."[43]

To summarize, both Treaties provide four grounds for the annulment of decisions of the "lower instance":

1. Lack of legal competence.
2. Major violations of procedure.
3. Violation of the Treaty or any rule of law relating to its application.
4. Abuse of power.

Commentators see the source of these Treaty specifications for annulment in the practice of the French Conseil d'Etat.[44] The terminology used is identical with that of French jurisprudence. As to their interpretation, it is now settled both by the commentators and by the Court

[43] ECSC Treaty, Article 33.

[44] This conclusion is supported by Cavare, "Le recours pour excès de pouvoir en droit international public," Mélanges Mestre (1956) 63 and Lhuillier, Une conquête de droit administratif Français. Paul Reuter has voiced some reservations on this score in 67 Rev. Dr. Pub. (1951) 119. Mylord, 7 Wirtschaft u. Wettbewerb (1957) 483, finds that the treaty reflects "western concepts" corresponding to German as well as French law. Rivero, Cours de droit administratif comparé (1957–58) 76, points out that these well-known grounds for reversal are not set down in French statutes or regulations but are deduced from the jurisprudence of the Conseil d'Etat.

of Justice that it must be derived from the national jurisprudence of the Six.[45]

In the *Algera* case[46] the court stated it must look to the national administrative law of the Six for the solution of the novel problems with which it was confronted in adjudicating the legality of the withdrawal of an exemptive act giving certain rights to employees. The Court of Justice stated:

> "Regarding the possibility of withdrawal of such executive acts, this constitutes a problem involving administrative law, with which the judicial decisions and principles of law of all the countries of the Community are quite familiar, but for whose solution the Treaty contains no rules. In order to avoid a denial of justice, the Court, therefore, is obliged to determine the question in accordance with the rules recognized by the legislation, principles of law and judicial decisions of Member countries.
>
> "A study of the comparative law shows that in the six Member countries an administrative act granting subjective rights to the interested party may not, in principle, be withdrawn if the act in question is a lawful act."

The *Assider* case[47] involved the interpretation of the fourth ground of reversal alluded to above, the cryptic *"détournement de pouvoir."* In seeking its meaning, the Advocate General[48] reviewed as sources of interpretation of the Treaty the official reports of the German and French governments used in their respective parliaments in supporting ratification of the Treaty. He particularly noted the statement in the German report that the concept of *"détournement de pouvoir"* was borrowed from French jurisprudence and that it corresponds closely to the German administrative law concept of *"Ermessensmissbrauch."*[49]

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[45] Bebr, "The Development of a Community Law by the Court of the European Coal and Steel Community," 42 Minn. L. Rev. 845 (1958) reviews the decisions of the Court of Justice in applying municipal law to interpret the ECSC Treaty. *Cf.* Schlochauer, Der Rechtsschutz.

[46] Case No. 7–56. Algera v. The Assembly of the Coal and Steel Community. III Recueil de la Jurisprudence de la Cour (official publication of the Court of Justice) (1957) 87, 114.

[47] Case No. 3–54. Assider v. The High Authority, I Recueil, 123.

[48] The role of the Advocate General in the procedure of the Court of Justice was modeled on that of the Commissioner before the Conseil d'Etat. He is not the opponent of the private appellant, but under Art. 11 of the Protocol on the Code of the Court of Justice his function shall be to present "publicly and with complete impartiality and independence oral reasoned arguments on the cases submitted to the court in order to assist the court in the performance of its duties. . . ." These expositions are generally accepted by the court and then become a statement of the jurisprudence of the court cited by legal writers. Compare the role of the Commissioner before the Conseil d'Etat. Schwartz, B. French Administrative Law and the Common-Law World (1954) 138.

[49] Forsthoff, Lehrbuch des Verwaltungsrechts (1958), 1. Band, 74 and 373; Jellinek, Verwaltungsrecht, 1948, 38 and 447 *et seq.*

> "The idea of *'détournement de pouvoir,'"* he observed, "was certainly not invented by the authors of the Treaty, and to attempt to form an opinion as to what should be *'détournement de pouvoir'* under the Treaty * * * it is necessary first to know what it is in the law of our respective six countries." (p. 149)

The works of French and other commentators were also reviewed. In the conclusion of this presentation of the law, the statement appears:

> "The juridical principles which lie at the basis of the judicial control of administrative action are truly common in our six countries. These (juridical) principles rest on the same concepts of the administrative action which is required to be exercised within the limits of law and with the same concept of the role of the judge of such action, which is to verify whether these limits have been respected." (p. 168)

The foregoing analysis, espoused by the Court of Justice, basing its own administrative jurisprudence on that of the Six, has the effect of approximating the status of the High Authority (or the Commission) to that of a national administrative agency whose decisions are subject to annulment by the Conseil d'État or corresponding organ under the respective national laws of the member countries.

In particular, the jurisprudence of the Conseil d'État of France and the comparable courts of administrative review, that exist in each of the Six, appear to be pertinent to determining the procedural requirements for administrative determinations, such as are made by the High Authority or the Commission. May we not anticipate the ultimate clarification of the rules of procedure by the Court of Justice by reviewing for ourselves the analogous jurisprudence of the Conseil d'État and corresponding organs in the Six member countries?

VI. Administrative Law of the Six

Fortunately for our inquiry, there is a generic similarity in the administrative laws of the Six and a vast literature about it.

French Practice. The oldest of the administrative tribunals among the Six is the Conseil d'État of France. In the development of its jurisprudence the four grounds for annulment noted above came to be fully recognized, and numerous studies and analyses by French writers on the Conseil d'État have commented on this important development in the law.

The Conseil d'État has progressively insisted on the application of adequate procedural safeguards by all bodies whose decisions it reviews. This is well illustrated in the case of *Veuve Trompier,* which commentators see as marking one of the most significant changes in the juris-

prudence of the Conseil d'État that has ever occurred.[50] The Conseil d'État in this and other cases has adopted something very much like the British concept of "natural justice" by requiring that, *even in the absence of a statutory rule,* certain procedural safeguards be faithfully followed by the decision-making body. The adversary character of the procedure in any jurisdiction subordinate to the Conseil d'État is rigorously enforced. It has been said that "in France any jurisdiction without absolute respect for this principle is inconceivable."[51]

The authorities on administrative law have long enunciated this principle. Thus Font-Réaulx[52] says:

> "The various legislative texts or regulations relating to special administrative tribunals contain few provisions applicable to the conduct of the proceedings. The jurisprudence had to fill this gap by deciding that any administrative jurisdiction, in compliance with established principles, was obliged to ensure the benefit of a free and adversary defense appearing before it."

Alibert says:[53]

> "As to the procedure to be followed by the deciding bodies, whenever the texts are silent in this respect reference must be made to the general principles of law. It was particularly decided that any jurisdictional body is obliged, even in the absence of any relevant text, to apply the usual and traditional forms of procedure customary in the various jurisdictional bodies."

The specific principles applicable to all proceedings are described as follows by Font-Réaulx:[54]

> "Whether the procedure before a given jurisdiction is entirely in writing or mixed, the private party must be notified of the action

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[50] In Dame Veuve Trompier-Gravier, Conseil d'Etat, May 5, 1944, (reproduced in the Appendix, *op cit.* to Schwartz) the Conseil d'Etat annulled the Order of the Prefect of the Seine depriving the complainant of a license to maintain a newsstand. The ground for annulment was solely the failure of the Prefect to allow the complainant an opportunity to be heard before the revocation. There was no regulation requiring a hearing in such cases. In stating the law, the Commissioner said: "Certain decisions, by virtue of their nature and their object, *must be preceded by a hearing.* . . . When an administrative decision assumes a penal quality and has a sufficiently serious adverse effect on the situation of an individual, our jurisprudence requires that the individual be given an opportunity to present his point of view on the measures affecting him." (Schwartz, *op. cit.* pp. 342–345.) See also M. Long, P. Neil and G. Braibant, Les grands arrêts de la jurisprudence administrative, 1958, p. 253. Comments to same effect in Letourneur and Drago, "The Rule of Law as understood in France," 7 American Journal of Comparative Law (1958) 147 at 168 *et seq.*

[51] Letourneur and Drago, *loc. cit.* 168.

[52] Pierre de Font-Réaulx, Les Pouvoirs devant le Conseil d'Etat contre les Décisions des autres Tribunaux Administratifs (1939) 173.

[53] Raphael Alibert, Le Contrôle Juridictionnel de l'Administration au Moyen du Recours pour Excès de Pouvoir (1924) 224.

[54] de Font-Réaulx, *op. cit.* 173–4.

> instituted against it and must have complete freedom in submitting its defense by written statements. In the Audit Office where the examination is entirely in writing a special procedure is provided in order to permit the accountable person to submit his documents in proof; . . . still in pursuance of the general principles, no document may be duly submitted to the judge if the parties have not been in a position to inspect it. A great number of decisions have emphasized the importance of this rule. The parties must be able to examine all the documents submitted to the judge: the administrative file, the papers which are not annexed to the file, results of the examination, etc."

Morel[55] states:

> "There is a certain number of principles, considered to be inherent in a proper rendering of justice, which are observed . . . even when the law is silent . . . such is the principle that no one may be judge and party, the principle of free defense, the rules that no document may be submitted to the judges unless the parties were acquainted with the content thereof and had the opportunity to discuss it, the principle that a tribunal may decide only the matters that are brought before it, but, however, must decide all of such matters."

Another basic rule is that the decision must analyze all the relevant objections and material submitted by the party. Font-Réaulx[56] states as follows:

> "Furthermore, a jurisdictional body must decide all the matters that are brought before it by the parties. However, only such matters are to be decided. Unlike a civil jurisdiction, an administrative body does not consider this rule as having any connection with the merits of the case but as a rule concerning the form which may provide a ground for a reversal."

Morel continues:

> "Judgments will be void unless they contain the reasons in support of the decision. This constitutes an essential rule of good administration of justice. It is not enough—writes Mr. Glason—that the judge be fair, they also must prove it. . . . The judges must furnish an answer to all points raised in the action, admit them or deny them, stating the reasons on which they based their decision."

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[55] Morel, Traité Elémentaire de Procédure Civile (1949) 4. See also, Affaire Ollier, Conseil d'Etat, June 10, 1932, Dalloz Hebdomadaire 1932, 434; Affaire Disch-Vitus, Recueil des Arrêts du Conseil d'Etat, 1947, 129; de Font-Réaulx, *op. cit.* 183.

[56] de Font-Réaulx, *op. cit.*, pp. 173, 174.

German Practice

German administrative jurisprudence treats infringements of procedural safeguards in a manner substantially similar to French jurisprudence.[57] However, it grants even more protection than the French because in respect to the *'détournement de pouvoir'* it holds to the concept of *'anständiges und redliches Verhalten'* or *'moralité administrative'* as a ground for revision. German legislation differs from the French also in providing that judgments in administrative matters shall be rendered only after oral hearing. It also provides that the administrative court is not bound in its decision by the motions of the parties, but may establish facts by *ex officio* inquiries, which has the effect of allowing it to override erroneous motions made by the parties.[58]

Netherlands Practice.

Administrative law in the Netherlands has been created as the need for it arose, and can be found in various Acts. On November 8, 1958, a general Act, regulating appeal of administrative decisions, was submitted to Parliament. This Act, however, will only complement already existing administrative law and will not supplant it.

Treatises on administrative law have described a set of general rules which can be found in most, if not all, the various administrative Acts. The following enumeration is by Professor A. M. Donner:[59]

> —The right to impartial officials who make the decision (interested officials must excuse themselves or be replaced).
>
> —The right of access to all documents, unless special reason exists for secrecy.
>
> —The right to be heard, assisted by counsel, and to reply.
>
> —The right to receive an early, clear, and properly motivated decision which, moreover, must be communicated properly.

While administrative law in the Netherlands is not administered under a central court as in France, it gives evidence of certain unifying influence through jurisprudence, doctrine and, in general, by the traditional desire for impartiality, propriety, and correctness of government in general. These elements can be found in the Economic Competition Act and in the decree implementing this Act and, in practice, in the administration by the Committee for competition instituted by the Act and in the Ministry.

[57] Forsthoff, Lehrbuch des Verwaltungsrechts, pp. 56 *et seq.*, W. Jellinek, Verwaltungsrecht, pp. 299 *et seq.*

[58] Gesetz über das Bundesverwaltungsgericht, September 23, 1952. (BGBl. I, P. 625.)

[59] The 28th Report of the Association for Administrative Law in the Netherlands. Advisory Report (1948). Professor Donner is now President of the Court of Justice of the Community.

Belgian Practice

The Belgian Conseil d'État, barely ten years old, has adopted a policy that fully recognizes the rights of the private parties seeking relief before it:

—Parties are entitled to counsel.
—All documents must be communicated to the parties.
—The procedure is adversary (*contradictoire*).
—Briefs (*mémoires*) may be filed.
—A hearing is held and oral argument is permitted.
—The decision must state its reasons (*motives*).[60]

Administrative orders are subject to annulment by the Conseil d'État on the grounds of:

1. Violation of substantial formalities or formalities prescribed by law upon pains of nullity.

2. Abuse of power and misuse of power (*excès de pouvoir et détournement de pouvoir*).

The procedural safeguards required of administrative authorities are in conformity with the general principles of law noted above, namely the "rights of defense" and the right to have the proceedings be of an "adversary" character.[61]

Luxembourg Practice

The highest administrative court is the Conseil d'État created under the law of January 16, 1866, on the model of the French Conseil d'État. The procedure before this body is written and of an adversary character (*contradictoire*). All documents are required to be communicated by each party to the other. Decisions are pronounced in a public hearing and must state their grounds (*motives*).

The same principles of adversary proceedings apply to the lower administrative tribunals and the Conseil d'État has on review of their decisions annulled decisions in certain instances on the ground that the right of defense of the parties was violated, for example, when the parties were not given the documents contained in the record of the case (*dossier*).[62]

[60] R. Lievens, "The Conseil d'Etat in Belgium," 7 American Journal of Comparative Law (1958) 572–6; Articles 12 and 14.

[61] *Id. ibid.*, J. P. Haesaert, La sanction par le Conseil d'Etat des vices des formes (1959); Cyr. Cambier, La censure de l'excès de pouvoir par le Conseil d'Etat; Jean Sarot, Conseil d'Etat, Répertoire des Arrêts et Avis de la Section d'Administration, 1948–1953. Among the important decisions supporting the principles of requiring disclosure of evidence to the parties are: Decisions No. 2628, July 3, 1953, and No. 1965, November 19, 1952 of the Conseil d'Etat.

[62] Unpublished decisions of the Conseil d'Etat, 17.11.1948 (Metz) and 25.1.1950 (Ginter).

Italian Practice

The Italian practice is very similar to the French practice above described. All of the acts of administrative bodies are subject to an appeal before administrative courts, mostly before the Consiglio di Stato. The procedure before such courts is quasi-judicial with full regard to the traditional rights of defense. The grounds for appeal to such courts are very similar to those outlined in the description of the French system: incompetence, violation of law, *"eccesso di potere."* The existence of such guaranties reacts on the administrative procedure. It is the general view that where such administrative acts touch on a *"diritto soggettivo"* the procedure must follow a quasi-judicial pattern, that is to say, be conducted in what is termed an "adversary" manner which provides for disclosure of claims and for the full discovery of evidence by each party.

Under Italian law the procedure provided in Articles 85 to 90, EEC Treaty, would relate to *"diritto soggettivo"* as involving civil contract rights and constitutional rights relating to the conduct of a private enterprise. Parties in such proceedings are entitled to the following:

—The right to counsel;[63]
—The full disclosure of claim;[64]
—An appropriate time in which to prepare the defense;[65]
—A full disclosure of evidence;[66]
—The right to personal hearing;[67]
—A decision stating the grounds for the conclusion.

The discussion of the administrative law of the Six in the *Assider* case by the Advocate General confirms the view here expressed of the close similarity in their jurisprudence.[68]

If the Court of Justice were to follow the jurisprudence of the Six it would import the "usual and traditional forms of procedure" developed in the national laws of the Six to govern the procedural rules of the Commission and the High Authority.

The abandonment of certain sovereign rights over their nationals by the Six in favor of the Community was a political act of immense consequence; but this delegation of jurisdiction over nationals to the Community and its courts was circumscribed by certain safeguards. The new supra-national government was to be a government under

[63] Article 50 R. D. 22.1.1934 n. 37.
[64] C. d. s. 10.3.1950 n. 138 Giurispr. Amm. 35–50, p. 1220.
[65] C. d. s. 5.5.1948 n. Giurispr. Amm. 35–50, p. 1220.
[66] C. d. s. 18.51938 n. 435 Giurispr. Amm. 1935–50, p. 1231.
[67] C. d. s. 8.6.1951 n. 58 Giurispr. Amm. 1935–50, p. 1198.
[68] Assider v. The High Authority, I Recueil (1955) 128 contains a discussion of French, Belgian, Luxembourg, Italian, Netherlands, German administrative law. See also Livre Jubilaire du Conseil d'Etat, Paris, 1952.

law, and the ultimate authority on the legality of its acts was a court of justice, not an executive body. There was no thought of turning over the affected persons to arbitrary authority. Quite the contrary, the most advanced administrative procedure and, we must assume, the "rights of defense" so dear to continental administrative law, were assured by the adoption of the full grounds of annulment which have long served to bring cases for review before the Conseil d'État.

With these principles of procedure governing the rights of parties in mind, let us now examine the actual practice in regard to procedure adopted by the Six in the precise field of regulation here involved, the control of restrictive practices under national legislation.

VII. Procedural Safeguards in National Regulation of Restrictive Business Practices

The foregoing principles governing general administrative practice in the Six also find reflection in the national laws addressed specifically to restrictive business practices. The laws governing competition give recognition to the fact that especially in the regulation of economic questions there is need for adequate safeguards to avoid the evils of ill-informed or biased treatment of such issues. With the sole exception of the Monopolies Commission of the United Kingdom, whose scope of activity is now severely limited, the practice of affording full rights of defense in restrictive practice cases or, in the alternative, of subjecting administrative determinations to a full court review of facts as well as law is common to the Six, as it is to the United Kingdom and the United States. To state it another way: In none of the national legislations examined does the restrictive practice legislation leave fact finding at the administrative level unchecked by both denying a full opportunity for defense before such body and at the same time restricting appeals to the review of questions of law only. The degree of formal procedural protection that the administrative level is required to afford to interested parties, it would seem, is in direct ratio to the degree of finality that its findings carry. It is unthinkable that findings of fact could be both made *in camera* and be unreviewable. To illustrate this generalization, the legislation and practice in regulation of competition in five important industrial countries, France, Germany, Netherlands, United Kingdom, and the United States, will be reviewed.

France

A government proposal was made in 1952 to regulate restrictive practices by an "Administrative Tribunal" which was to have the same procedure as the Conseil d'État and was to be subject to the appellate jurisdiction of the Court of Cassation. This scheme of procedure was re-

jected.[69] Instead, a less formal method of administrative supervision was adopted in the Law of 1953.[70] This later was held void and replaced by a decree of June 24, 1958. This law sets up a *"Commission technique des ententes"* as an advisory body whose recommendations would be made to the government. These recommendations are not appealable to the Conseil d'État. *But action upon the recommendations is referred to a regular court of law.* The government can only submit the matter to the regular French courts which, in the ordinary course, give the respondents assurance of full rights of defense and judicial protection. The procedures of the *Commission technique* nonetheless contain certain safeguards to the industry under investigation:

—Parties have access to the reports made by the Commission's Rapporteur (Article 9) and to the documents submitted by the Minister of Economy to the *Commission technique.*

—The *Commission technique* may, in its discretion, hear the testimony of any one it pleases.[71]

—The decision must state its grounds (Article 15).

—The Minister to whom the recommendations are transmitted may give the parties a hearing before submitting the case to the courts (Article 17).

By retaining the competence of the ordinary courts, the French procedure has the merit of avoiding a multiplication of quasi-judicial tribunals.

Germany

German practice affords the maximum procedural protection to respondents in restrictive practice cases. The German Law Against Restraints of Competition[72] follows formal procedures in the weighing of the complex economico-legal problems involved in restrictive practice

[69] Bill adopted by the National Assembly on July 10, 1952. Not enacted. Reproduced in Restrictive Business Practices, Annex C. Supplement No. 11B, U. N. ECOSOC Report p. 72. Articles 17, 20 and 27ter. See note 16.

[70] Decree No. 53–704 of August 9, 1953. J. O. August 10, 1953, p. 7045. See also Decree No. 54–97 of January 27, 1954. J. O. January 28, 1954, p. 1004, containing Rules governing the *Commission technique des ententes.* The Decree No. 53–704 was modified by Decree No. 58–545 of June 24, 1958.

Goldstein, "National and International Antitrust Policy in France," 37 Texas L. Rev. (1958) 188.

[71] Since the deliberations are closed, it has met with the following criticism:

"The secret character of the procedure before the Commission, the few guarantees afforded to the parties and the discretionary power of the Minister of Economic Affairs will not win the confidence of French businessmen."

[72] Gesetz gegen Wettbewersbsbeschraenkungen (Law Against Restraints of Competition) Bundesgesetzblatt, Teil I, 1957, I. p. 1081. No. 41 (1957). English Translation, World War Info. Service Part I. No. 58–1 U. S. Department of Commerce. Cf. Langen, Kommentar zum Kartellgesetz.

cases. The law gives the following specifications as to how the Cartel Authority shall handle cases:

—The rules for taking evidence before the Cartel Authority are those of the Code of Civil Procedure (Art. 54(2)).

—The testimony of witnesses is made a matter of record (Art. 54(3)).

—The participants have a right to present their views to the Cartel Authority and to an oral hearing (Art. 53).

—The orders of the Cartel Authority "must contain a statement of reasons" (Art. 57(1)).

—Participants may make objection to the order of the Cartel Authority (Art. 59).

—Public oral hearing is given to objections (Art. 61).

The appeal under the German law to the Oberlandesgericht (Art. 62) is of great breadth. It includes review of both the facts and the law.[73]

A special feature in the law is the protection of business secrets (Art. 71(2)). In safeguarding secrecy of material, the law also safeguards the parties from being judged upon undisclosed evidence as follows:

> "(2) . . . The Cartel Authority shall deny its consent for the inspection of its files if this is considered necessary for substantial reasons, especially in order to safeguard manufacturing, operating, or business secrets. If the inspection has been denied or is not permissible, the documents involved may be used as the basis for a decision to the extent only to which their contents have formed part of the pleadings."

A second appeal to the Federal Supreme Court is allowed under certain circumstances.[74]

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[73] The wide scope of this review is set forth in Articles 68 and 69 and the first paragraph of Art. 70 as follows:

(1) The appellate court shall investigate the facts on its own motion.

(2) The presiding judge shall see to it that formal defects be eliminated, vague applications explained, appropriate applications submitted, sufficient factual statements completed, and, moreover, all statements be made which are essential for ascertaining and evaluating the facts.

(3) The appellate court may direct the parties to make statements within a specified time on points which need clarification, to indicate evidence, and to submit documents in their possession as well as other evidence. If necessary action is not taken within such time, a decision may be made on the basis of the record regardless of the missing evidence.

(4) The appellate court shall decide by a decree (*Beschluss*), based on the conclusions freely reached by it on the entire record of the case. The decree may only be based on such facts and evidence as to which the parties have been heard.

[74] Articles 73 and 75(2) provide respectively:

Art. 73(2) provides that the permission for such an appeal shall be granted if

1. A point of law of importance as a principle must be decided, or

2. The development of the law or the ensurance of a uniform practice requires a decision of the Federal Supreme Court.

The elaborate protection afforded by the German legislation to the rights of defense indicates a strong preference of this country for the consideration of economico-legal problems under judicial safeguards.[75]

Netherlands

Of special interest is the most recent of the restrictive business practices statutes of the Six, the Economic Competition Act of the Netherlands.[76]

This Act is based upon the philosophy that restrictive business practices are not "per se" detrimental to the public interest of the nation.

The Act provides, accordingly, for the possibility

a. to declare certain restrictive agreements binding on non-signers,

b. to declare certain restrictive agreements non-binding for being contrary to the public interest and their observance forbidden,

c. to declare certain types of restrictive agreements non-binding as being contrary to the public interest,

d. to impose obligations and regulations upon enterprises implicated in concentration of economic power.

Competence to issue orders in the four above-mentioned instances has been vested in the Minister of Economic Affairs in connection with other Ministers concerned.

All restrictive agreements have to be notified to the Minister of Economic Affairs.

Before taking action in the field of competition the Ministers must

(4) No permission for such an appeal from a decision of the Appellate Court is required if such appeal is based on one of the following procedural defects:

1. If the Court which made the decision was not constituted in accordance with law;

2. If a judge participated in the decision who was excluded by law from the exercise of such judicial function or had been successfully rejected on grounds of prejudice;

3. If a party was not heard in accordance with law;

4. If a party was not represented in the proceeding in accordance with the provisions of this law, provided it had not explicitly or by implication agreed to the conduct of the proceeding;

5. If the decision was made upon an oral hearing at which the provisions on the public character of the proceeding were violated;

6. If the decision does not set forth the reasons on which it is based."

Art. 75(2) provides, on the *second* appeal for a review on the law only.

[75] M. Martin and Berthelmann, "Jurisdictions administratives en Allemagne," Conseil d'Etat, Etudes et Documents (1952), 166, states in regard to German administrative law:

"The annulment of administrative acts (*Anfechtungsklage*) is singularly close to the appeal on the grounds of abuse of power developed by the Conseil d'Etat" (p. 176). The Baden Ordinance of 30 March 1947 is cited as allowing reversal for both abuse and excess of power, similar to the French doctrines.

[76] Staatsblad of the Kingdom of the Netherlands, 1958, nr. 413.

hear an independent "Committee for competition" instituted by the Act.

Such request by the Ministers to the Committee for an advisory report will be published. Persons interested may submit their views on the question to the Committee in writing.

The role of the Committee in cases directly affecting individual interests is the following:

The Committee shall hear all interested parties who have applied therefor in writing; it may adjourn the hearings as soon as it is of opinion that it has been adequately informed.

In submitting its advice, the Committee shall hand over all relevant documents, including transcripts of the oral hearings.

The Ministers as well as the Committee are empowered to receive information.[77]

If there exist demonstrable facts, which provide grounds for supposing that a restrictive agreement is in conflict with the public interest, the Ministers may inspect books and documents of enterprises or empower officials to do so by written mandate.[78]

In a decree[79] implementing the Economic Competition Act, the following procedural requirements for the Committee are set forth:

> —Notice must be given of the points on which persons are to be heard (Sec. 8.2.).
>
> —The parties have a right to counsel (Sec. 8.3.).
>
> —Persons heard may be present at the hearing of other persons during the same investigation (Sec. 9.1.).
>
> This shall not apply to the extent that, in the opinion of the Committee,
>
> a. the interests of the investigation are opposed to the presence of the person concerned,
>
> b. the interests of those being heard are opposed to the presence of the person concerned, and the interests of the investigation do not require his presence (Sec. 9.2.).
>
> —Before making a recommendation the Committee will communicate its findings as to the facts to those who have been heard (Sec. 11.1.).

No information, however, may be communicated if its publication would be disproportionately harmful to one of the parties concerned (Sec. 11.2.).

Those who have been heard may make known to the Committee their objections to its findings (Sec. 11.3.).

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[77] Section 16 of the Act.
[78] Section 17 of the Act.
[79] Staatsblad of the Kingdom of the Netherlands, 1958, nr. 489.

—The advisory memorandum shall contain the Committee's findings as to the facts, together with its evaluation of those facts and its recommendations concerning the measures to be taken (Sec. 12.2.).

This procedure before the Committee safeguards the rights of the parties concerned without entailing undue publication of normal business secrets.

The Ministers are able to review the facts as they are gathered by the Committee as well as its evaluation of these facts.

The decision as to the remedies to be applied has to be made on the grounds of the public interest including considerations of general economic policy. The responsibility for such a decision must rest, accordingly, with the Ministers, who may indeed act contrary to the advisory recommendation. The order which gives legal form to the decision must state the grounds on which it rests.[80]

The procedure, which regulates the taking of the decision by the Minister, has not been treated in the Act.

However, an appeal may be lodged from an order with the Court of Industrial Appeal based upon the following grounds:

—that the order conflicts with a generally binding legal rule

—that, when arriving at the decision, the administration used its competence for another purpose than it has been created for (abuse of power)

—that in weighing the interests concerned the administration could not within reason have come to the decision it took (arbitrariness)

—that the administration otherwise behaved in a way which is incompatible with generally required standards of proper administration.

All persons materially affected by the order may lodge an appeal on these grounds.[81]

Annulment by the Court of an order declaring a certain restrictive agreement non-binding results in parties being free to reassert their agreement. The original agreement is not automatically reinstated.

Belgium

A draft of regulatory law to govern abuse of economic power has been presented to the Belgian Parliament under date of June 9, 1959.[82] The procedural safeguards of the inquiry pursued by the proposed

[80] Sections 4, 6, 8, 10, 12, 19, 23, 24, 27 of the Economic Competition Act.

[81] Section 33 of the Act.

[82] Sénat de Belgique, *Session* 1958–59, Doc. 216. "Projet de loi sur la protection contre l'abus de la puissance économique."

Economic Council (*Conseil du Contentieux Économique*) into alleged abuses are the same as those referred to in the foregoing discussion of the administrative law of Belgium including full disclosure of the evidence (Art. 7 of the Draft Law).

United Kingdom

The Restrictive Trade Practices Act, 1956,[83] rules on the propriety of restrictive agreements and understandings. It supersedes the practice under the Monopolies and Restrictive Practices (Inquiry and Control) Act of 1948,[84] which had met with the dissatisfaction and criticism of industry, except as regards inquiries into monopoly conditions which are still conducted under it. As one writer has said:

> "But an industry before the Commission is in very truth on trial for its way of life, and if it is condemned it has either to change it radically or to go out of existence. In these circumstances it is suggested that the procedure should be judicial and not administrative. . . . The methods of obtaining evidence were not beyond criticism. The industry was not supplied with the names of those who had given evidence against it. There was no cross-examination and no indictment."[85]

The criticized procedure under the 1948 Act was in the conduct of investigations by a Commission which had been left free to determine to which extent the persons interested were to be allowed to be present and to be heard and which was no bound by any formal procedural safeguards in preparing its recommendations for submission through a minister to Parliament.

Under the 1956 Act, a new court of record was created, called the Restrictive Practices Court, whose procedures are judicial in character and whose decisions are subject to appeal on questions of law, but whose findings of fact are final and non-appealable. The Restrictive Practices Court rules[86] are worth noting. They provide:

> —The Registrar shall serve all parties to the agreement with a notice of the proceeding (Rule 9).
>
> —The Registrar, acting for the Government, shall identify the agreement brought before the court (Rule 6).

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[83] 4 & 5 Eliz 2. Ch. 68. Printed also in Martin, Restrictive Trade Practices and Monopolies (1957).

[84] 11 & 12 Geo. 6, Ch. 66, *Ibid.*

[85] W. J. Brown, "The Law of the United Kingdom relating to Monopolies and Restrictive Trade Practices," Proceedings, International Bar Association Cologne Conference, 1958, p. 4. See also, Grünfeld, "Antitrust Law in Britain Since the Act of 1956," 6 American Journal of Comp. Law (1957) 439 at 465.

For a contrary view as to the fairness of these proceedings see, The Public Corporation. University of Toronto Comparative Law Series, W. Friedmann, ed. (1956), C. Grünfeld and B. S. Yamey, "United Kingdom," 374.

[86] The Restrictive Practices Court Rules, 1957. Statutory Instrument 1957, No. 603.

—Each party respondent who wishes to be heard may appear and retain counsel (Rule 14).

—Each party respondent shall file exchange statements of the case with particulars of the provision of the Act and of the facts and matters on which he intends to rely (Rules 18 and 20).

—The testimony of witnesses, upon application of any party, can be ordered to be taken by the Court (Rule 57); the parties may order production of documents in each other's possession (Rule 38); facts at the hearing shall be proved by oral examination of witnesses (Rule 52).

—The Court may allow admission of evidence, otherwise inadmissible under the law relating to evidence (Rule 55).

(Under this rule, in the opinion of the British author,[87] various types of compiled reports would be admissible as would be the testimony of economists or other expert witnesses.)

It is clear that under the foregoing rules the Court would be restricted to the consideration of matters in evidence, known to both parties, a practice in accord with the British concepts of justice in administrative proceedings.[88]

United States

The practice in the antitrust field in the United States has always been to afford a complete hearing to the parties charged with a violation of law at the first instance of decision making. This is automatically assured in cases originating before the courts. In the case of matters coming before the administrative agency having jurisdiction in the

[87] Martin,* A., Restrictive Trade Practices and Monopolies, Appendix 7, p. 244. *Cf.* Wilberforce et al. Law of Restrictive Trade Practices and Monopolies (1957).

[88] It is clear from the English decisions that *ex parte* information or statements should never be taken into account or even used to supplement the results of a public hearing or submission of written statements until and unless the party against whom the *ex parte* material may be used has been apprised thereof and had an opportunity to controvert or correct it. Horn v. Minister of Health [1937] 1 K. B. 164. Errington v. Minister of Health [1935] 1 K. B. 249, the decision turned on these principles. Commenting on the procedure, Greer, L. J., said:

> "Now it seems to me that if, as I think, the Ministry were acting in a quasi-judicial capacity they were doing what a semi-judicial body cannot do, namely, hearing evidence from one side in the absence of the other side, and viewing the property and forming their own views about the property without giving the owners of the property the opportunity of arguing that the views which the Ministry were inclined to take were such as could be readily dealt with by means of repairs and alterations to the buildings. . . . Those who represented the owners had not had the opportunity of cross-examining him (the Engineer), testing the value of his opinion, and representing to the Minister through the Inspector that no weight should be attached to his view." (p. 264.)

See also Local Government Board v. Arlidge [1915] A. C. 120 and Re an Arbitration Camillo Ritzen and Jewson & Sons, 40 Sol. Jo. 438.
Sir Alfred Denning, Freedom under the Law, 117 speaks to the same point.

field, the Federal Trade Commission (FTC), a full hearing is held either before a hearing examiner or before the Commission itself. If before an examiner, the submission to the Commission (upon notice to the parties) of an "initial decision" containing "findings and conclusions and an appropriate order" is required to be served on the parties, and the initial order, upon the request of a party, shall be reviewed by the Commission with opportunity for the parties to be heard.[89] There is an appeal from the FTC to the Federal Court of Appeals.[90]

The procedure before the examiner gives full rights of defense to the parties. These procedural safeguards had been clarified by the courts before the passage of the Administrative Procedure Act.[91] The following rules were outlined by Justice Brandeis of the U. S. Supreme Court in *St. Joseph Stock Yards* v. *U. S.*:[92]

> "The court may set aside an order
>
> —for lack of findings necessary to support it;[93]
>
> —or because findings were made without evidence to support them;
>
> —or because the evidence was such 'that it was impossible for a fair-minded board to come to the result which was reached';
>
> —or because the order was based on evidence not legally cognizable;
>
> —or because the facts and circumstances which ought to have been considered were excluded from consideration;
>
> —or because facts and circumstances were considered which could not legally influence the conclusion;
>
> —or because it applied a rule thought wrong."

In *Federal Trade Commission* v. *Curtis Publishing Co.*[94] the scope of the appellate review of an order of the Federal Trade Commission was considered and the findings of fact of the Commission were held inadequate.

In *Morgan* v. *United States*[95] the Supreme Court stated, as a ground for setting aside an order of the Department of Agriculture, that "the order was based on evidence not legally cognizable" and "Facts and circumstances were considered which could not legally influence the conclusion." It stated that 'the hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his con-

[89] Federal Trade Commission Act. Sec. 5(b) 15 U. S. Code Sec. 45 *et seq.*
[90] *Ibid.*, Sec. 5(c).
[91] 5 U. S. Code Sec. 1001–1011 (1946).
[92] 298 U. S. 38 at 74 (1936).
[93] Citation of cases omitted on all these paragraphs.
[94] 260 U. S. 568 (1923) at 580, 582.
[95] 298 U. S. 468 (1936) at 480.

clusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action."

The crucial point which has been emphasized throughout the jurisprudence reviewed above is summarized in the Report of the Attorney General's Committee[96] on Administrative Procedure:

> "The parties, then, are entitled to be apprised of the data upon which the agency is acting. They are entitled not only to refute but, what in this situation is usually more important, to supplement, explain, and give different perspective to the facts upon which the agency relies. In addition, upon judicial review, the court must be informed of what facts the agency has utilized in order that the existence of supporting evidence may be ascertained."

We find these essential principles of procedural fairness incorporated in the Administrative Procedure Act.[97] This Act reflects some ten years of painstaking study and drafting. The dangerous conditions which had led to the enactment of this code governing procedure before all Federal administrative bodies were described as follows by the President's Committee on Administrative Management:[98]

> "There is a conflict of principle involved in their (administrative agencies) make-up and functions. . . . They are vested with duties of administration . . . and at the same time they are given important judicial work. . . . The evils resulting from this confusion of principles are insidious and far reaching. . . . Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights. But the mixed duties of the commissions render escape from these subversive influences impossible. Furthermore, the same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness; it weakens public confidence in that fairness." (p. 40)

It was to eliminate the worst features of this indictment that the Code was formulated. It goes a long way to embodying the principles of defense that have come to be considered essential to the conduct of administrative hearings:

1. *Complaints.* Where administrative hearings are prescribed by statute, they shall be upon proper notice of the legal authority and jurisdiction under which the hearing is held and the matters of fact and law asserted.

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[96] The Report on Administrative Procedure in Government Agencies, Sen. Doc. No. 8, 77th Cong. 1st Sess. (1941) p. 72.

[97] See Note 81.

[98] Report on Administrative Management in the Executive Branch of the Government of the United States (1937).

2. *Open hearings.* Parties have the right to appear in any agency proceeding (Sec. 6(a)) and to present their case or defense by oral documentary evidence, to submit rebuttal evidence and conduct such cross-examination as may be required for a full and true disclosure of the facts (Sec. 7(c)). The decision-making officers shall not consult any person on any fact in issue unless upon notice and opportunity for all parties to participate (Sec. 5(c)).

3. *Right to Counsel.* The parties have the right to be accompanied, represented and advised by counsel (Sec. 6(a)).

4. *Burden of Proof.* The proponent of the order shall have the burden of proof (Sec. 7(c)).

5. *Weighing all the evidence.* The agency shall consider all relevant evidence.

6. *Record.* All testimony and exhibits shall constitute the record. It shall be available to the parties (Sec. 7(d)).

7. *"Initial" or "Preliminary" Decisions.* Decisions by subordinates shall be subject to review by the agency upon opportunity to be heard accorded to parties (Sec. 8(a)).

8. *Form of Decisions.* All decisions shall have findings of fact and conclusions "as well as the reasons or basis therefor upon all the material issues of fact, law or discretion presented on the record. . ." (Sec. 8(b)).

VIII. Rights of Defense before the Commission of the EEC

From the standpoint of the business interests concerned it is of the utmost importance that the procedures for the determination of alleged violations of the Treaty by such interests provide the customary and normal safeguards that have stood the test of experience in the field of economico-legal jurisprudence. Specifically, it is important that a wide variety of economic fact-material be brought to the attention of the decision making agency and be given discriminating attention. Moreover, to avoid misunderstanding and errors based on misreading the complex facts of industry, all facts and arguments presented to the fact finding agency should be accessible to all parties so that they can meet these facts and arguments.

Full trial before the Court of Justice. A provision in Article 66 of the ECSC Treaty raises the question as to whether the Court of Justice is not called upon in some instances to act as a trial court. After referring to appeals under Article 33, this clause reads: *"Notwithstanding the proviso of this article,* the Court shall be fully competent to judge whether the operation effected is a concentration within the meaning of Section 1 of this article and of the regulations issued in execution thereof."

In the EEC Treaty, Article 87(d) provides that Regulations shall be

issued "to define the respective responsibilities of the Commission and the Court of Justice in the application of the provisions referred to . . ." Under this clause the Court of Justice could no doubt be used as a trial court in certain cases. It seems clear that in certain cases Member States and natural persons as well as enterprises may initiate legal action before the Court of Justice (EEC Treaty Article 175, 180, 181, 182).

Whether it would be desirable to provide by Regulation that certain questions arising under Articles 85 and 86 be submitted to a full trial before the Court of Justice might depend upon the nature of the determination to be made. There is a strong argument for having two classes of cases subject to such full trial procedure:

—The enforcement of all penalties, and
—Any denial of an application under Article 85(3).

Where the Court of Justice is to act purely as an appellate court, a reasonable control over the methods adopted in reaching a "reasoned decision" by the Commission would be justified. It will be recalled that under the ECSC Treaty the Court of Justice

> "may not review the High Authority's evaluation of the situation, based on economic facts and circumstances, which led to such decisions or recommendations, except where the High Authority is alleged to have abused its powers or to have clearly misinterpreted the provisions of the Treaty or of a rule of law relating to its application." (Article 23)

Such restriction is absent in the EEC Treaty. The Regulations regarding the scope of appeal should authorize inquiry into the fair handling of proof to support conclusions and not accept all facts found by the Commission as final.[99]

In the light of the jurisprudence and the standards of "good administration" reviewed in this paper, the following fundamental principles should guide the Commission's procedure:

1. Parties to be apprised of the nature of the alleged violation and provisions of the law deemed to be violated;

2. Parties to have access to, and opportunity to, rebut all the evidence used by the Commission in support of its decision;

3. Parties to be free to have counsel at all stages of the proceeding and to offer evidence in their behalf. Any decision not to hear or receive

[99] Bebr, *op. cit.* urges that the Court of Justice should not attempt to review economic findings as it would "interfere with and even jeopardize an effective administration of the common market by the High Authority," at p. 865. This is scarcely a conclusive argument in the light of the universal practice in restrictive practice legislation alluded to in the text of this monograph. *Cf.* Jeantet, "Les intérêts privés devant la Communauté Européenne du Charbon et de l'Acier," 70 Rev. Dr. Pub. (1945), 687.

evidence thus offered to be accompanied by the reasons for such refusal. Error in such refusal to be a ground for reversal of the final decision;

4. Parties to be free to present a full defense to the Commission with reference to all the evidence, not merely a right at an indefinite time to "make their observations";

5. The Commission to render its decision on the proof produced only;

6. The Commission to publish a reasoned decision stating its factual and legal basis, reviewable on the sufficiency of the facts to support the conclusions as well as on the law.

An infringement of these fundamental principles, for whatever reason, deprives the procedure of the European Community organs of an important element of justice and would threaten to impose arbitrary procedures guided by expediency.[100] The authorities of the Community have a great responsibility in setting up a procedure that will meet the test of the "Rule of Law."

[100] See on this point Resolutions of the International Chamber of Commerce, 17th Congress (1959) II/5 Paragraph c, regarding the EEC Treaty: "In every stage of the procedure, the rights of the defense must be respected. . . ."

WILLIAM G. RICE

Intercantonal Public Assistance Liability in Switzerland

Before 1848 the Swiss Confederation—except while it was dominated by Napoleon—had never had either executive or judicative national officers. In that year, after a brief civil war, a new constitution greatly strengthened the central authority—somewhat as sixty years earlier the United States Constitution, on which the Swiss Constitution was in part modeled, tightened the loose union of thirteen states in North America. The Constitution of 1848 established the first agencies of execution (the Federal Council) and of judication (the Federal Tribunal). The Tribunal, which sits at Lausanne, till 1875 was composed of judges who served on per diem pay. Some functions that seem judicial rather than executive were entrusted to the Council. When the Tribunal's position was greatly strengthened in the general constitutional

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PREFATORY NOTE: The principal organs of Swiss government are often referred to herein by the initial letters of their names in French. Thus AF (Assemblée fédérale) is the Congress or Parliament; CF (Conseil fédéral) is the chief executive (council); and TF (Tribunal fédéral) is the highest court. The last abbreviation refers also to the reports of that court's decisions, a series which began with the decisions of the year 1875 and has continued annually one volume (though usually bound as two or more books). In my citation of cases, TF is preceded by the number of the volume (the year being always 1874 plus this number) and is followed by those of the part (in roman notation) and the page (in arabic) of the volume. Whether the particular decision is in French or German or Italian is not indicated.

Most of the decisions officially reported in German appear in reliable French version in the Journal des Tribunaux (JdT) to which reference is given whenever possible. But not more than 1/10 of the 2000 or more decisions annually are reported in any publication.

I use for each canton its name in the language principally spoken there—thus, Ticino (Italian), and Fribourg, Neuchâtel, Valais, Vaud (French), and German names for the rest—except that (for both canton and city) I anglicize Genève to Geneva and Zürich to Zurich. The divided cantons of Appenzell, Basel, and Unterwalden (the six "half" cantons) are sometimes called Inner and Outer Appenzell, Rural and Urban Basel, Nidwalden and Obwalden.

In translated quotations of foreign language texts, foreign words within parentheses are those of the original; English words within brackets are inserted either to bridge over or summarize omitted passages or to clarify ideas incompletely expressed in quoted passages. Neither parentheses nor brackets contain any editorial comment.

It is a pleasure to mention that financial support for my study of judicial aspects of Swiss federalism, of which this article is a product, was afforded by the American Philosophical Society and the University of Wisconsin, and assistance in library facilities and personal consultation were accorded me by many persons and institutions of both sides of the Atlantic.

Much of this article and of "A Glimpse of Swiss Intercantonal Litigation," 6 Am. J. Comp. L. (1957) 235, is part of a book now in press (C. C. Nelson Co., Appleton, Wis., 1959), entitled Law Among States in Federacy.

revision of 1874, the settlement of public law controversies between cantons (including those relating to public assistance), was transferred from the Federal Council to the Federal Tribunal. Other transfers between Council and Tribunal (in both directions) by statute are authorized by the Constitution and have been made. Thus cantonal (executive) orders of expulsion of confederals (citizens of another canton) to their home canton (canton of citizenship)—often called canton of origin—at first could be appealed by the deportee (for violation of his legal rights) to the Federal Council, which was the final determiner. In 1893 such review was transferred by statute from the Federal Council to the Federal Tribunal. This made the latter the final (and only judicial) authority on questions of intercantonal deportability whether the issue was raised by the aggrieved individual or by his canton.

But this article is not generally concerned with individuals' suits. It relates to the exercise by the Federal Tribunal as a court of public law of its jurisdiction to settle controversies between cantons concerning responsibility for public assistance to needy individuals not citizens of the assisting canton (that is, either aliens or confederals) and its related privilege of expelling such persons as a means of escaping the burden of supporting them.

Obviously, when a person needs public relief, particularly medical care, it often must be supplied without delay and therefore in the first instance by the government of the place where the person in need is. Yet the burden, at least if the need is lasting, should not fall finally upon the government of a place with which the individual may have, and may have intended to have, no enduring connection.

In Switzerland, as in the United States, the central government does not administer or finance poor relief. It is a responsibility of the component states or, by their internal law, of these states' local units, which I call towns.

California attempted by various devices to discourage "Okie" immigration during the depression of the '30's, but it never sued the state of origin for reimbursement of its costs of relieving such immigrants. A Swiss canton, however, has this legal remedy. It does not have to support confederals if they are or become permanent public charges. It may demand of the canton of origin, at the option of the latter, either the costs of support of its needy cantonal or else acceptance of his (compelled) return.

Why this difference between the two countries?

In the first place, the Oklahoma citizen becomes a California citizen the moment he arrives to stay, but the citizen of one Swiss canton does not acquire a new cantonality by establishing himself in a new canton. Born or naturalized citizens of the United States are "citizens of the

State wherein they reside."[1] As a corollary the citizen of one state promptly loses that citizenship upon removing to another state. Thus California would have no claim against Oklahoma even if relief were tied to state citizenship, as it is in the Swiss Confederation.[2]

But the right and duty of public relief in the United States is not tied to state citizenship; nor is it in most states concomitant with domicil or residence alone. Its basis is usually "settlement"; and settlement is acquired by residence continued for a period of months or years set by statute, without receipt of public assistance during this period.[3] Though in moving within one state a person retains his settlement until he gains a new one, this rule seems not to apply to a person moving from one state to another. Apparently no state or locality has ever successfully sued another state or its political subdivision for reimbursement for relief it has furnished to such a person. Understandings, not legally enforcible, exist between public assistance authorities by which this rule of retention of settlement after termination of residence by departure to another state is applied in determining whether a person who falls in need in the state to which he has recently moved will be cared for by the authorities of his last place of settlement in another state if he is returned there—with his consent.[4] In short, no rule of law requires

[1] Const. amdt. XIV, sec 1. This does not entitle them to political rights or rights of support in case of need, matters determined by states, which rarely speak in the terms of state citizenship or define it.

[2] Also, the relation of cantonal citizenship to Swiss citizenship differs from the relation of state citizenship to U.S. citizenship. "Every citizen of a canton is a Swiss citizen," says article 43 of the Constitution. And every Swiss citizen is a citizen of at least one town (*Gemeinde, commune*) and canton. "It is said that there still survive some exceptions to the rule that every Swiss citizen is also a citizen of a commune." Christopher Hughes, The Federal Constitution of Switzerland, (1954) 79.

[3] Winchester v. Burlington, 128 Conn. 185, 21 A2d 371 (1941). Dane County v. Barron County, 249 Wis. 618, 26 NW2d 249 (1947). "In this state determination of residence for legal settlement purposes is governed by the identical principles that determine residence for divorce and voting purposes." Milwaukee County v. State Dept. of Public Welfare, 271 Wis. 219, 222, 72 NW2d, 727, 729 (1955).

[4] Statutes, expressly or by construction, usually do not authorize involuntary removal: Theide v. Scandia Valley, 217 Minn. 218, 14 NW2d 400 (1944); Custer County v. Reichelt, 67 S.D. 471, 293 NW862 (1940); Ashland County v. Bayfield County, 246 Wis. 315, 16 NW2d 809 (1944). And a statute that authorizes compulsory removal may not authorize removal to another state (expulsion): State v. Lange, 148 Kan. 614, 83 P2d 653 (1938). Moreover, it is still uncertain whether involuntary removal is constitutionally permitted, Matter of Chirillo, 283 N.Y. 417, 28 NE2d 895 (1940); Chirillo v. Lehman, 38 F. Supp. 65 (1940) (statute repealed 1946); Custer County v. Reichelt, 67 S.D. 471, 293 NW862 (1940); North Dakota v. Perkins County, 69 S.D. 270, 9 NW2d 500 (1943). *Cf.* Edwards v. California, 314 U.S. 160 (1941). A Uniform Transfer of Dependents Act has been adopted by 10 states. It authorizes state welfare authorities to make reciprocal agreements with corresponding authorities of other states concerning support and transfer (between states) of persons needing public assistance. I believe no such compacts have been made; but some, presumably unenforcible, "gentlemen's agreements" between public agencies exist. And also between private agencies. Brackett, "The Transportation Agreement," 1926 Proceedings, National Conference of Social Work, p. 532-5. On the law relating to the movement of persons who are public dependents or "likely to become a charge," see Mandelker, "Exclusion and Removal Legislation," 1956 Wis. L. Rev. 57.

any state or its subdivision to provide for its ex-residents who have moved to another state. This may be explained as termination of settlement by migration to another state, or it may be explained as absence of legal obligation of one state to another. If, as seems to be the case, the absence of legal duty relates not only to *former* residents of a state, but also to persons who are presently resident there and fall in need when casually away from what is still their residence, the second explanation fits better—that is, that there is a complete lack of public liability across state lines, a want of interstate law in this area.

The Swiss Constitution assures the basic freedom of citizens (only Christians before 1874) to move from canton to canton. The Swiss citizen of one canton who wishes to reside in another[5] is, however, required to obtain a license or permit from the latter. Such a license may be denied only for federally defined reasons. And the fee for its issuance is limited to 6 francs a year by federal statute.[6] (Quite separately by complying with cantonal law, he may acquire cantonal naturalization, with or without renunciation of his existing cantonality.[7]) Such a resident confederal (*confédéré établi, niedergelassener Eidgenössische*) may lose his license for federally defined reasons and may then be expelled to his "home" canton.[8] Modified by international treaties, a similar regime applies to aliens.

The Constitution of 1848 confirmed the existing liability of each canton for the support of its cantonals in need,[9] by allowing revocation of license to reside and repatriation if a Swiss residing in a canton not his own became a public charge. The word permanently (*d'une manière permanente, dauernd*) was added to the last phrase in 1874;[10] and a new article declared that the obligation of reimbursement of cantons giving assistance to Swiss of other cantons should be regulated by statute.[11] Moreover, it was now expressly stated that cancellation of the

[5] His home canton could not object to his acquiring residence in another, Schwyz v. Zurich, 35 TF I 661. (Though the individual was a ward of Schwyz, to whose controlling decrees Zurich had to give effect, Schwyz was held not to have ground for legal complaint.) But in Zurich v. Geneva, 51 TF I 309 (after the federal Civil Code of 1907 was in effect), it was held that Geneva was bound to return a ward living in Geneva without leave of her guardian to the canton (that of domicil, C.C. art. 406) controlling wardship.

[6] Hughes (note 2), 56–58.

[7] Renunciation and naturalization are in themselves no ground for litigation between cantons; but if a person who has multiple cantonality renounces his citizenship of one canton, the other (or another) of his home cantons may test the validity of the renunciation if it increases its liability for his support. Zurich v. St. Gallen, 69 TF I 243, 250, 1944 JdT I 330, 333.

[8] It is unnecessary to distinguish between permanent and temporary residence (*établissement* and *séjour, Niederlassung* and *Aufenthalt*), since, in neglect of Const. art. 47, no federal legislation has been passed to "determine the difference" between them, and the difference has not been important in any intercantonal litigation.

[9] Const. of 1848, art. 41 (renumbered 45 and significantly revised in 1874).

[10] Art. 45, par. 3.

[11] Art. 48: "A federal statute shall regulate liability for the costs of medical care

license was permitted only if the canton of origin refused to undertake support by reimbursing the canton of residence for the assistance it furnished the needy individual,[12] and that deportation could be ordered only by the executive council (*gouvernement, Regierung*) of the canton of residence and after notice to the like authority of the canton of origin.[13]

The intercantonal law of public assistance of 40 years ago that was described by Dr. Dietrich Schindler in *The Administration of Justice in the Swiss Federal Court in Intercantonal Disputes*[14] has undergone much change, chiefly by judicial decision. It is some of these decisions that I propose to examine.[15]

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and burial of poor citizens of one canton who fall sick or die in another." The statute of 1875 governing this matter is still in effect.

[12] Art. 45, par. 3.

[13] Art. 45, par. 5.

[14] 15 Am. J. of Int. L. (1921) 149. The latest cases Schindler mentions were decided in the spring of 1918. More detailed contemporaneous accounts of this much litigated field may be found in Eduard Gubler, Interkantonales Armenrecht (1917), and Max Wild, Die Interkantonale Armenpflege auf Grund des Konkordates über wohnörtliche Armenstützung, (1927), both Zurich University doctoral dissertations. More recently T F Judge Louis Python summarized the law in "La jurisprudence du Tribunal fédéral en matière d'assistance intercantonale," 1945 JdT I 2.

[15] When Jacobus ten Broeck, speaking in San Francisco at the 1955 Forum of the National Conference of Social Work, pleaded for an interpretation of the United States Constitution fit for the needs of the shifting population patterns of present-day America, he was discussing a matter that has long engaged the attention of the central court of Switzerland, whose constitution and statutes and court decisions have much to say about rights of residence and public assistance between cantons.

Among the conclusions that ten Broeck submitted concerning the law as it ought to be, are these:

> "1. The right of free movement should be treated as a basic right and constitutionally protected accordingly.
>
> 2. . . . It seems particularly an aspect of the personal liberty guaranteed by the Fifth and Fourteenth Amendments.
>
> 3. The Supreme Court has not adequately protected this right . . .
>
> 4. . . . The Fourteenth Amendment says that all [who are national citizens by birth or naturalization are also citizens] "of the state wherein they reside." Newcomers, consequently, are made by the United States Constitution citizens of the state . . . . Length-of-residence . . . prescriptions are unconstitutional . . . .
>
> 5. Length-of-residence requirements in public welfare [laws] violate the equal protection command of the Fourteenth Amendment. . . . Newcomers . . . stand in the same relation to the purpose of the law as do long-time residents. Under the equal protection clause they must be treated alike."

While it would not be fitting to take this occasion to develop Prof. ten Broeck's argument concerning the United States Constitution, I use his words as a sort of text for my exposition of the adjudication of the Swiss Federal Tribunal. Despite blindness, Prof. ten Broeck, chairman of the Department of Speech at The University of California, Berkeley, has honored his original profession, the law, by important contributions to legal publications. He speaks with particular authority since he is a member of the California Social Welfare Board. His address entitled "The Constitution and the Right of Free Movement," was brought to my attention by another sightless lawyer, George Card, Vice President of the National Federation of the Blind. The address has been published as a pamphlet by the National Travelers Aid Association, New York.

A. The Standing of the Canton and the Town in Public Assistance Suits

In the easternmost of the cantons (the only trilingual canton), Graubünden, poor relief is administered by each town (*Gemeinde, commune*). In a suit[16] against Graubünden brought by the canton of Zurich, the claim for support of an Austrian woman was based on a treaty between Switzerland and Austria, which required each country to support indigents of the other's nationality until they could be repatriated.[17] Naturally, the treaty did not indicate what Swiss authorities were to perform this duty. The court found in the instant case that the duty fell upon the canton (it being, as contrasted to the Confederation, responsible for relief) in which the individual was residing when she fell in need and became subject to deportation to Austria. Her expulsion (not pursuant to the treaty) into another canton, where she was succored till repatriation was carried out, gave the latter canton a right to be reimbursed by the former canton, though by its law poor relief was the responsibility of the town. As the Tribunal stated:

> It is the duty of the cantons to see that the obligations the Confederation has assumed by treaty on behalf of its member states should be fulfilled within their [respective] territories and to require this of their political subdivisions (*Verbände und Selbstverwaltungskörper*) to which they have entrusted the carrying out of certain parts of their public administration. For burdens which accrue from faulty performance by such an entity, they may in all cases get redress from it, but it is never proper for them to refer to it for redress either the Confederation or another canton which has claims arising out of this conduct. 47 TF I at 330.

This cantonal liability is not limited to treaty duties; the same rule applies in the case of Swiss citizens. In *Bern v. Vaud,* it was held that the plaintiff canton, on behalf of its town which had incurred the expense, could sue for reimbursement from Vaud, whose law provided for town, not cantonal, liability for poor relief.[18] Indeed, in this sort of

[16] Zurich v. Graubünden, 47 TF I 324, 1922 JdT I 127. See also St. Gallen v. Luzern, 52 TF I 384, 1927 Praxis no. 55, where the needy person was of German nationality and was protected by a German-Swiss treaty.

[17] Ratification and publication of a treaty was said in Baselstadt v. Solothurn, 8 TF 436, 443, to transform it into "rules of internal public law" and thus the duties laid on the nation "are made applicable to the cantons involved as public law," though the claim of one canton for reimbursement by another was not to "a claim ex contractu arising out of the treaty" but rather quasicontractual.

[18] The State of Vaud has no basis for its defense that it is not suable because by its law towns are responsible for relief and the State is not their representative. As the Federal Tribunal has constantly held (e.g. 23 TF 1467, 39 TF I 606), in intercantonal disputes covered by Art. 177 the cantonal government has fundamentally the right and duty to represent the interested town. Bern v. Vaud. 49 TF I 446, at 449.

case,[19] it has been held that only a canton, not a town, may be *plaintiff*,[20] though generally intercantonal disputes include those "between authorities or municipalities of different cantons."[21]

Local responsibility for relief was recognized as justifying acceptance by a canton on behalf of some of its towns of a compact concerning relief of persons of multiple cantonality. This concordat of May 28, 1926, established the rule that all cantons of which a person needing relief was a citizen should share equally in the costs of his care. To this intercantonal treaty Zurich adhered on behalf of those of its towns—all but three—that so desired and gave notice of this to the relief authorities of all the other party cantons. Likewise to those of Glarus, when that canton soon after adhered to the concordat. Such was the background of a suit between Zurich and Glarus:[22]

> In 1927, a controversy arose between Winterthur [a town covered by Zurich's action] and the Evangelical Relief Agency [dispensing public assistance] of Glarus-Riedern [a town of Glarus] over the support of their common citizen Jacob Tschudy. Since 1921 Tschudy has been cared for by a Zurich asylum entirely at the expense of Winterthur.
>
> . . . Winterthur demanded that Glarus-Riedern, since Glarus' adherence to the treaty, bear half the expense. The Evangelical Relief Agency refused since Zurich was not a party to the concordat. In response to a request of the Zurich Relief Administration the Glarus [cantonal] Relief Administration ordered the Glarus-Riedern Agency to honor the demand of Winterthur. On its [the Agency's] appeal to the Executive Council of Glarus, its refusal was sustained.
>
> . . . Glarus argued that such a treaty could be concluded with obligatory effect only between Zurich as a canton and other cantons, because concordats, like treaties between states generally, can be concluded only between legal persons or bodies of equal legal capacity; furthermore the declaration of the Zurich Council on behalf of 161 of its towns was not published in the collection of federal statutes, as were the agreement of May 28, 1926 and the later adherences of other cantons.
>
> There is no reason why, in a federal state, treaty arrangements concerning a matter of public administration which is entrusted in a canton to subordinate political (*öffentlich-rechtlich*) units for

[19] Art. 175 and 177 of the Judicature Act then in force amplified Const. art. 113, which designates the Tribunal as the court to try public law cases between cantons.

[20] Hauptlin v. Baselland, 71 TF I 240, 245, 1945 JdT I 584, 588. But suit may be brought by a canton *against* a town of another canton: Zurich v. Reute (Appenzell—A. Rh.), 55 TF I 33, 1929 JdT I 407, where the court said it was "unquestionably a controversy of public law between cantons."

[21] Z. Giacometti, Schweizerisches Bundesstaatsrecht, sec. 86 III (1949).

[22] Zurich v. Glarus, 54 TF I 328, 1929 JdT I 489.

> their independent control, can not be validly made between these units even though they belong to different cantons, or between one canton's subdivisions and another canton. The defendant has not been able to establish any objection of federal law or any other reason of practical nature that stands in the way. The argument that the character of relations with other cantons and therefore the determination concerning permanent contractual obligations which one of the self-governing subdivisions of the canton may contemplate creating must be for the cantonal authorities, has no significance where, as here, the treaty is completed with the collaboration and intermediation of the cantonal Council. [To be sure such an adherence, unlike regular cantonal adherence, which requires merely notice to the Federal Council, must leave to the decision of the cantons which are already parties whether they wish to accept it.] In the instant case, however, the Executive Council of Zurich not merely informed the Federal Council of the declarations of the 161 towns but sent a like notice also to the individual cantons including Glarus. In Glarus' receipt of this notice without objection is to be found its tacit assent to the proposed agreement. In the circumstances this is enough for its taking effect, though no express reply was ever sent to Zurich. 54 TF I at 330–333.

Without specifying when the compact became binding between the towns of Zurich and other cantons, the Tribunal sustained the plaintiff's position.

The fact that, although the court may give commands to cantons, declaratory judgments are usual,[23] probably makes it easier in public law litigation between cantons for the court not to differentiate between cantons and their political subdivisions. In the United States, where also decrees in cases between states are often declaratory, the sovereign immunity of states but not of municipalities sharpens the line between them.

In connection with *Zurich v. Glarus,* a word should be said about the treaty-making powers of cantons. Public law agreements between cantons—consideration of which in more detail is postponed—do not require federal approval, as compacts between members of the United States do; and if such approval is given, it is not conclusive of their validity; nor does it make them federal law. Though in an early case the court had said that federal approval was necessary,[24] in *Zurich v. Glarus* it declared:

> According to article 7 of the Constitution the cantons are substantially free in the making of treaties on matters left to them,

[23] Margrit Gut, Staatsrechtliche Streitigkeiten zwischen den Kantonen und ihre Beilegung, (1942) 101 and 177. Giacometti (note 21), sec. 86 III.

[24] Dampfschiffgesellschaft v. Luzern, 24 TF I 444, 446.

> that is, on matters not within paragraph 1 of that article. ["Cantons are forbidden to make special alliances and treaties of a political nature."] Hence agreement between the contracting cantons is enough to complete a treaty. Collaboration by the federal officers is not necessary. . . . Approval by the Federal Council or Assembly (if given) does not prevent the federal authorities, and particularly the Federal Tribunal in controversies under article 175(2) and (3) of the Judicature Act, from refusing to recognize and apply the treaty if by practical experience it proves to conflict with the federal law or the rights of other cantons . . . 54 TF I at 333–334.

But the Constitution does require that intercantonal treaties be communicated to the Council (from which, if it or another canton demands, they go to the Assembly) for scrutiny. But this too, in Bolle's opinion,[25] "is not a condition of their validity or completion, but only a regulatory requirement." Whether the giving of approval by the Federal Council entails some added moral or legal responsibility to oversee the execution of the treaty, pursuant to article 102, par. 1(2) of the constitution,[26] is uncertain.

Intercantonal agreements are not always of public law character. If arrangements between cantons are commercial or proprietary rather than governmental, they are transactions of private law and are not subject to these constitutional rules.[27]

B. Nature of the Obligation to Provide Public Assistance

The two major principles of Swiss intercantonal law regarding support of the poor are that the canton of origin, the canton of citizenship, the home canton, is responsible for permanent support, and that the canton where the individual is when his need arises is responsible unless and until the liability of some other government is properly engaged.

The first rule is inherent in the Swiss notion of citizenship—of political participation—as it is of nationality in international relations, though, as Jacobus ten Broeck has observed, it has not yet been held to be inherent in the state citizenship of the United States referred to in the first sentence of the Fourteenth Amendment.

The second principle is well stated in the decision of a suit by Zurich against Vaud and Geneva. Here the Republic and Canton of Geneva

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[25] Arnold Bolle, Das interkantonale Recht, (1907) 118. I do not find this point ever to have been discussed by the court.

[26] "The Federal Council . . . watches over the observance of the Constitution . . . as well as of the provisions of federal concordats."

[27] Walther Burckhardt, Kommentar de schweizerischen Bundesverfassung vom 29. Mai 1874, (1931) 75. Note that the German word *Vertrag* means both treaty and contract.

were held liable for relief provided by Zurich to Mrs. S., a Russian woman (and her child), who, in Geneva, where the child was born, had fallen in need while her husband was imprisoned for forgery in Zurich, and who had been expelled first from Geneva and then from Vaud.[28] It appeared that she could not be returned to the Soviet Union, with which Switzerland had no diplomatic relations.[29] The obligation of relief applies alike to Swiss or to alien. And it benefits alike those who are undeportable by reason of law (as in the foregoing case) or by reason of health (where a federal statute applies), and those who are deportable but have not been deported.

So the canton where a confederal is when his need first transpires is liable for immediate help. But if his need is of a long-term nature, the cost of his care is collectible by this canton from his home canton unless and until the latter receives him back (if he is transportable). Perhaps it would be better to state the matter thus: his home canton is bound to take back its cantonal—the individual has no choice—who needs or is on the verge of needing[30] permanent assistance or, at its option, to reimburse the other canton for supplying this need according to the latter's standard of proper care. If this canton expels him without complying with the intercantonal procedure set by the constitution, it is liable for the cost of his care provided by any other canton. This is

[28] Switzerland has no treaty obligation concerning relief of needy Russians. But . . . the obligation to relieve foreigners must be deemed not only a duty of humanity, but also one inhering in the function of the state, one of its tasks that assures the maintenance of the public order . . . Until they are repatriated some canton has to care for their needs.

The Tribunal has already decided that [this duty means that] expulsion could not be used to saddle obligations of relief of one canton onto another . . .

These principles, it is true, have hitherto been applied only in cases where the obligation of assistance arose from an international treaty, but clearly they are just as applicable when, as in the present case, the obligation is a duty of humanity and may be justified by the requirements of public order. If a canton wishes to get rid of an alien, . . . it must not merely forbid him to stay and push him over the border into another canton; it must take steps looking to his return to his own country, and as long as such repatriation is impossible, it must, if there is need, look out for him.

. . . The Geneva authorities were so well aware [of Mrs. S's precarious economic situation] that one of the grounds of the order for her expulsion was that she was "without means of livelihood". . .

. . . It is a settled rule of decision that the obligation of public assistance does not require that the beneficiary be domiciled or resident in the canton's territory, but that a temporary abode (*simple séjour*) is enough.

. . . If it were only because S is serving sentence in Zurich that Mrs. S and her son remain in Switzerland, the question would arise whether it would be fair that the canton obliged to support them should have to keep on carrying the burden throughout his imprisonment. But . . . even if S were free, his repatriation and that of his family could not take place.

. . . So the obligation of assistance rests . . . on Geneva, in whose territory the need for relief first arose. 51 TF I at 328–332. Zurich v. Vaud and Geneva, 51 TF I 325, at 328–332.

[29] The possibility of finding some other country that would receive him is not suggested.

[30] Clerc v. Geneva, 65 TF I 214, 217.

the law whether the expulsion is improper because the person's need is only temporary[31] or because, though his need is permanent, the proper procedure is not followed.[32]

The rule against repatriation of confederals whose need is only temporary has been attacked, but unsuccessfully. In *Valais v. Zurich*[33] the person in need was a Valais woman licensed to reside in Zurich. When the latter canton offered Valais the alternative of receiving her back or paying for her care, the Valais Department of Interior asserted that her need was only temporary and so fell on the canton of residence.[34] Zurich then took steps to deport her and Valais sued. The court said that, though only the individual could obtain review of an order of deportation for violation of his constitutional rights:

> still the home canton is concerned with an expulsion on poor-law grounds in that the expulsion is not permissible until an official demand for appropriate support has been made on it; also notice must be given to the home canton before the deportation is carried out. [So it may obtain] by an original public law action (*Klage*) in the Federal Tribunal a declaration that the intended or already ordered expulsion is not justified for lack of compliance with the constitutional requirements.[35] 71 TF I at 236.

The court reviewed at length the decisions and the opinions of writers on permissible expulsion and held that the costs of care during temporary illness did not justify expulsion or give ground for reimbursement. It refused to follow Zurich, which argued that it had a right of repatriation without expulsion, that is, without cancellation of her license to reside and with privilege to return when well, and it pointed out that article 45 par. 3 of the Constitution must be read with article 43 par. 4, which gives the confederal where licensed to reside "all the rights of the citizen of the canton and of the town" (with stated exceptions). While article 45 par. 3 authorized withdrawal of the license if "permanent" need of public relief arises, the burden rests on the canton of residence when disability is not permanent.

A federal statute clearly imposes the care of indigents who are nontransportable on the canton in which the person is when his need transpires. But when a confederal resident, who is transportable, is the person in need, the court talks in terms of cancellation of residence and repatriation. Until this procedure is completed, the canton of resi-

[31] Bern v. Geneva, 66 TF I 63, 1941 JdT I 13.

[32] Bern. V. Vaud, 49 TF I 446 (unless the delay is attributable to the home canton).

[33] Valais v. Zurich, 71 TF I 233, 1945 JdT I 578.

[34] This is the court's statement of Valais' claim. Here the canton of residence was also the canton where she became ill.

[35] The court cites Bern v. Solothurn, 49 TF I 330, 1923 Praxis no. 120, discussed later in which it had held that behavior of members of a confederal's family that made it difficult for him to obtain housing did not make him a permanent public charge subject to ouster to his home canton.

dence must care for him.[36] But on what canton falls the burden of caring for a Swiss who requires temporary succor when he is outside both his canton of origin and his canton of residence, but is transportable? Can he be sent to either or to which? Or is the canton where his need arises finally liable?[37] Nothing in the Constitution or statutes reaches this, and the reported cases leave the question open. For the alien, however, it is clear that the canton where he is first known to be in need is liable till he voluntarily leaves Switzerland or his departure is accomplished pursuant to treaty.

A case of alcoholism came before the court in *Vaud v. St. Gallen*.[38] The woman, designated X, a citizen of Vaud by marriage, resided in St. Gallen, where she had been committed as a habitual drunkard and later enlarged. She resumed drinking. Her husband's resources being exhausted, the Department of Justice and Health of St. Gallen demanded support from Vaud during a new committal for two years. Vaud refused. St. Gallen then ordered her expelled for two years unless Vaud paid for her care. Vaud unsuccessfully sued for annulment of this order on the ground that St. Gallen had no right to deport for nonpayment of costs of penal or administrative detention.[39] Strangely, it

[36] Bern v. Vaud, 49 TF I 446.

[37] Giacometti (note 21), sec. 23 III 2 (d), p. 236, says: "Cantons are required by federal law to give *temporary* succor to the indigent Swiss citizen at his place of residence or sojourn (*an seinem Wohn- oder Aufenthaltsort*) outside his home canton. This federal obligation is implied in the provision of Const. art. 45 par. 3, which allows cantons to withdraw on account of indigence permission to reside only from those who *permanently* become dependent on public assistance." But (unless *Aufenthalt* is read to include momentary presence) this seems not to answer the question whether costs of temporary care of an indigent person who falls in need while traveling outside his home canton, and his canton of residence, can be charged by the canton providing it to his home (or to his residence) canton. Perhaps the explanation is that if the person needs care before he can travel, he is momentarily untransportable and so must be cared for; while if he can travel, the canton need not provide any care.

[38] Vaud v. St. Gallen, 76 TF I 104, 1951 JdT I 120.

[39] Said the court: Propensity to drink is today recognized as illness and is so treated . . . Since [under the Penal Code] cantons have to execute the judgments passed by their criminal courts and bear the costs of execution, the Federal Tribunal decided in 74 TF I 28 that a canton whose criminal court had committed a neglected child, a resident confederal, to a reform school, could not require his home canton to support him there or, upon its refusal, to receive him back; for the costs of his care were by federal statute to be carried by the canton of residence. In the present case accordingly St. Gallen would have had to carry the cost of X's care if she had been subjected to a criminal prosecution . . . But *administrative* internment of habitual drinkers, which is a manifestation of judicial sovereignty (*Justizhoheit*), cannot be held the same thing. It is like sending a sick person to a hospital, a matter of social care, the costs of which, if by reason of poverty they can not be borne by the individual, must be borne by the organized community, like the relief of the poor. As far as comparison is proper of the administrative care of alcoholics under cantonal law with a federal arrangement, it resembles most a corresponding procedure of wardship, inasmuch as alcoholism is a basis for appointing a guardian under Civil Code art. 370 and may justify commitment under Civil Code art. 406. The cost of measures of wardship that become necessary, however, counts as poor relief, which the canton of residence may recover from the home canton, and for nonpayment of which it may proceed to repatriate the individual. 76 TF I at 109, 110.

seems to me, no objection was raised that a commitment for a fixed period negated the *permanence* of X's need. But the answer may be that the need was of incalculable duration, even though this treatment was prescribed for only two years.

When a money judgment is obtained, it is justified as a public law recovery analogous to private law recovery for *gestion d' affaires*. So it was explained in the early case of *Zug v. St. Gallen,*[40] quoted by Schindler. As in quasi-contract generally, no fault of defendant need be shown; the theory is that plaintiff deserves reimbursement for expenditures in the performance of what is properly the duty of defendant, rather than that defendant has by its blame-worthy or self-interested conduct caused a loss to plaintiff, though such a fault motif appears in some cases.

Ordinarily, as we have seen, liability not based on fault exists only after formal notice. But in some situations the Tribunal has granted recovery regardless of notice. A striking example is *Geneva v. Bern,*[41] where Geneva recovered for its outlay in caring for citizens of Bern who entered Switzerland (Geneva) destitute and too sick to travel. Two years later in *Geneva v. Urban Basel,*[42] the court said that in *Geneva v. Bern* the home canton's liability was "already fixed" when Geneva incurred the expense, probably meaning that the travelers were permanently in need of public assistance, as well as unfit to travel, before they arrived from France; whereas in *Geneva v. Basel* the Basel citizen coming to Geneva for childbirth became unfit for travel only when hospitalized for delivery and only temporarily (not permanently) in need of relief, so that Basel's liability was not engaged, unless Basel caused her migration to Geneva. *Geneva v. Bern* is exceptional not because Geneva was recognized to be entitled to reimbursement for care of persons entering the canton unfit for travel and presumably in permanent need of public assistance, but because the home canton is held liable (despite the statute of 1875) for Geneva's care of a confederal (Basel's citizen) unfit for travel and (despite the Constitution) for assistance given without previous notice to defendant of the individuals being assisted.

Up to this point we have ignored two topics covered by important intercantonal compacts. To these, (1) liability with respect to persons of plural cantonality, and (2) liability based on residence instead of origin, we now turn. To the compact establishing the latter regime, the contracting parties are generally those cantons in which, among their towns, residence rather than town-citizenship is the link for poor relief.

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[40] Zug v. St. Gallen, 31 TF I 404, 408. Recovery on this basis (*gestion d'affaires*) was first allowed in Urban Basel v. Solothurn, 8 TF 436, 443.

[41] Geneva v. Bern, 50 TF I 125.

[42] Geneva v. Baselstadt, 53 TF I 309, 1928 JdT I 590.

C. International Compacts

When Arnold Bolle wrote his dissertation on Intercantonal Law in 1907, he divided it into two parts, Intercantonal Law in General, and Concordat Law, of which the second part was the longer, for:

> The old confederation (*Eidgenossenschaft*) rested on the treaty principle. The decrees (*Beschlüsse*) of the Diet were as a rule not decrees of the majority to which the minority had to conform; rather, their binding force rested upon unanimous assent, and they did not bind the cantons (*Orte*) that refused assent. . . . The decree of the Diet of 1515 that in whatever concerned the honor and welfare of the cantons (*Eidgenossen*) the minority should follow the majority never became a practically effective principle and thus was never raised to the rank of positive law.[43]

The intercantonal treaty, the foundation of Swiss federacy, remains still an active factor in Swiss law. Particularly important is the legislative and usually "self-executing" treaty, often called concordat, a word that came into use in Switzerland early in the nineteenth century.[44]

In the time of Napoleon's Mediation (1803–1815), the Diet's statutory actions (federal *conclusa*) were of two types: decrees that were law for all cantons; and "federal concordats" which were binding only for those cantons that assented to them. At the same time, "conventions (*Verkommnisse* or *Konventionen*) between cantons—often called concordats"—continued to be made, which were "pure international law treaties," which merely had to be laid before the Diet for its information. These two types of concordats continued to exist under the new regime of 1815. The question of withdrawal of cantons from concordats they had accepted became acute. In 1836 the Diet decreed that withdrawal from federal concordats was restricted; a withdrawing canton had to obtain consent of the majority of the cantons or else pay dam-

[43] Bolle (note 25), 97.

[44] Outside Switzerland the word concordat seems to be confined to agreements between the Roman Catholic Church and political states. According to Huber, "The Intercantonal Law of Switzerland," 3 Am. J. of Int. L. (1909) 62, 73, n. 3, the term Konkordat came into Swiss usage to describe intercantonal agreements because the first such agreement made "after the re-establishment of the cantonal personality of statehood under the Mediation of 1803" dealt with ecclesiastical matters.

Huber, like Bolle (note 25), 122 before him, says that the term usually applies only to treaties "establishing legal norms." Giacometti (note 21) also says it describes the convention, the treaty of legislative, as contrasted to transactional, nature. But he limits it to a convention open to all cantons, saying, sec. 15 I:

> Not all intercantonal conventions are always called in practice concordats; for them, as for transactional treaties, also the expressions intercantonal Vertrag and Verkommnis are used synonymously; but everything called a concordat is such a convention . . . According to historic usage, the term concordat, if it has a special meaning, must be reserved to designate those intercantonal conventions which are of general concern and therefore open to all cantons, and thereby are at the same time harbingers (*Vorbereiter*) of federal legislation.

ages to the other canton parties thereto. But those of the other type, the "special concordats . . . contracted between individual cantons," were not subjected to this restriction.[45]

No "federal concordat" in this old sense could be made after the Constitution of 1848; the term, however, survived in article 90 of the Constitution (now art. 102), and now is understood to mean any legislative intercantonal agreement of general interest.[46]

An intercantonal treaty, even when formally approved by the Federal Council, is not federal law but cantonal law;[47] for *any* cantonal law that must have—and has—federal approval, still remains only cantonal law, which must comply with the federal Constitution.[48] Moreover, the validity of a treaty between cantons does not depend on federal approval;[49] and federal approval does not change its nature; it "has only declaratory significance."[50] As the court said in *Zurich v. Glarus*:[51]

> The collaboration of the federal authorities is not necessary.[52] The Constitution art. 7 requires only that cantons submit compacts (*Verkommnisse*) to the scrutiny of the federal authorities so as to give them opportunity to oppose their execution if the treaty contains anything contrary to the law of the Confederation or the rights of the other cantons. The approval of the Federal Council, or that of the Federal Assembly when it occurs, under art. 102 no. 7 and art. 85 no. 5, has therefore only the meaning that the approving authority sees no reason for opposing the operation of the treaty (*Vertrag*)[53]. . . . 54 TF I at 334.

[45] Bolle (note 25), 100–106.

[46] The constitutional text was quoted in note 26. Though the court and the legal doctors do not entirely agree on the width of the term concordat, they seem to be at one on what is a federal concordat. Compare the definitions of Bolle, p. 126, which I have followed, with those of Giacometti, who maintains, sec. 15, n. 13 and 32, that since 1848 all concordats are "federal"; but by defining concordat itself more narrowly, i.e. as only a convention open to all cantons, reaches the same conclusion. In the constitution "concordat" (without "federal") appears twice: in article 113, and transitory article 2. Apparently, it includes all intercantonal treaties. Perhaps "federal concordats," found only in art. 102, does also.

[47] Blätter für Zürcherische Rechtsprechung, vol. 8, no. 178 (1909), quoting from an unpublished and unnamed decision of the Tribunal fédéral. Also Uri v. St. Gallen, 80 TF I 178.

[48] Salamin v. Prefect of Sierre, 42 TF I 346, 349. Müller-Schuler v. Zurich, 71 TF I 249. (The Constitution requires the courts to apply *federal* statutes and treaties though they conflict with the Constitution, if they are later in date. *Cf.* note 59.)

[49] Bolle (note 25), 79 and 117, quoting earlier writers. Huber (note 43), 84.

[50] Giacometti (note 21), sec. 15 II. *Cf.* Lévy v. Vaud, 81 TF I 133, interpreting Const. art. 102 par. 1 no. 13, where the Federal Council's function appears to be the same as with respect to intercantonal treaties (*Ibid.* no. 7).

[51] Zurich v. Glarus, 54 TF I 328, 1929 JdT I 489.

[52] This clearly overrules (without mention thereof) what the court said in Dampfschiff Co. v. Luzern, 24 TF I 444, 446, as Giacometti, (note 21), sec. 15 n. 30, points out.

[53] In Const. art. 2 par. 7 the term used is *Verkommnis, convention;* in art. 102 par.

The concordat between cantons is the type of treaty called in international relations a convention (*Vereinbarung*), in contrast to a pact, a treaty of transactional character. The term compact, in reference to agreements between states of the United States includes agreements of both types;[54] but it is more often the uniform state law than the compact that performs the function of the concordat among Swiss cantons.[55]

The Federal Tribunal thus distinguished[56] between the two types of intercantonal treaty:

> If conventions (*Vereinbarungen*) between the cantons, by which they merely jointly undertake to apply the same legal principles (*abstrakte Rechtsregel*) for the uniform legislative regulation of a matter—concordats—are, according to the well-settled present-day customary law, subject to free termination by a party, the rule is quite different for transactional treaties (*bei rechtsgeschäftlichen Verträgen*). . . . If the legal validity accorded to such agreements (*Abkommen*) by public and international law is to have any meaning, the objective juridical situation created by them must remain binding on both parties so long as no specific ground for termination, set forth in the creative act itself or otherwise acknowledged by law, has arisen.
> 54 TF I at 203.

Giacometti sums up the law thus:[57]

> Just as a canton can repeal a statute, it must be able to repeal rules of law contained in a concordat. But legal relations based on intercantonal treaties of transactional character are different. They create contract rights and duties . . . that are withdrawn from the free control of one canton.

The usual method named by the concordat for terminating a canton's adherence is notice to the Federal Council.

Swiss jurists assert that though concordats are cantonal law, they prevail over cantonal statutes that conflict with them.[58] I have found

1 no. 2 it is *Konkordat, concordat;* in art. 7 par. 1 and art. 85 no. 5 and art. 102 par. 1 no. 7 it is *Vertrag, traité.* The wealth of seeming synonyms is confusing.

[54] But agreements may be made which are not compacts (in the sense of being valid only upon approval by Congress). Virginia v. Tennessee, 148 U.S. 503, 521 (1893). *Cf.* text at note 27.

[55] Uniform cantonal laws are not unknown. Case of the Bank of Luzern, 4 TF 74.

[56] Thurgau v. St. Gallen, 54 TF I 188, 1928 Praxis no. 167.

[57] Giacometti (note 21), sec. 15 I. The analogy to the statute does not seem to me compelling. But, unless the concordat otherwise provides, it is well settled that it may be adopted at each canton's pleasure, with adherence to it or release from it legally effective by mere notice. Bolle (note 25), 159, citing early decisions of the Tribunal; Huber (note 44), 87. Most concordats provide that such notice shall take effect at a date some months ahead. Paul Grätzer, Die Clausula rebus sic stantibus beim öffentlichrechtlichen Vertrag, p. 68.

[58] Burckhardt (note 27), 78; Giacometti (note 21), sec. 15 I; Gut (note 23), 135.

no pronouncement on this by the tribunal. Gut adds in a note, "This does not apply to transactional compacts," and invokes a passage in *Schwyz v. Zurich,*[59] which, to my mind, does not bear on the rank of intercantonal treaties.

Zurich v. Glarus,[60] quoted early in this article, involved a concordat providing for joint liability of home cantons when the beneficiary of relief was a citizen of more than one (*Doppelbürger, personne à double indigénat*). Apart from intercantonal agreement, the court's decisions up to then (1928) had stated the law to be that a canton providing public assistance to its own citizen could not recover from another canton, of which also he was a citizen; his relation to the first canton being the basis of the relief he received, that canton could not be looked upon as performing the other canton's obligation, nor as participating in a joint undertaking with the other canton.[61] Nor would the court recognize that any custom of contribution had arisen from the fact that certain cantons had arranged for sharing costs of support of persons of double cantonality.[62]

After a series of trial balloons and encouraged by a federally promoted intercantonal agreement for sharing the burden in multiple-cantonality cases, the Tribunal eventually repudiated the older cases and declared as a principle of intercantonal law the sharing of responsibility. It rejected the international law doctrine of no recovery and invoked *gestion d'affaires* to allow proportionate recovery between cantons whose citizenship the indigent enjoyed.[63] But it has not ruled on how this affects recovery against any of his cantons of origin by another canton that has cared for him.

Several of the German-speaking cantons have entered into a compact which partially substitutes the canton of residence for the canton of origin as the state ultimately liable for costs of long-term dependency on public support. But no case between cantons is likely to call for its application by the Tribunal because by its own terms controversies between cantons that arise under it are to be settled exclusively by arbitration.[64] The capacity of cantons thus to displace the Tribunal in favor of arbitration in any sort of controversy seems, for historical reasons, unquestionable.[65] Under the early versions of this concordat,

[59] Schwyz v. Zurich, 52 TF I 170, 177. Gut's distinction seems not to figure in the analogous problem concerning *international* treaties: Do they outrank *federal* statutes? Rice, "The Position of International Treaties in Swiss Law," 46 Am. J. Intl. L. (1952) 641; Looper, "The Treaty Power in Switzerland," 7 Am. J. Comp. L. (1958) 178, 184.

[60] Zurich v. Glarus, 54 TF I 328, 1929 JdT I 489. Text at note 22.

[61] Appenzell–A. Rh. v. Geneva, 23 TF 1463, 1468.

[62] Zurich v. Bern, 29 TF I 446, 449.

[63] Luzern v. Neuchâtel, 73 TF I 230, 1948 JdT I 47.

[64] "The task of the arbitrator is either by mediation, resting on considerations of equity, to bring to final settlement the strife between the parties, or to adjudicate it by strict positive law." Gut (note 23), 75.

[65] Gut, *op. cit.,* 74–76, 57 n. 34.

the Federal Council was named as arbitrator.[66] The 1937 revision substituted the Department of Justice and Police for the Council.[67]

But the existence of such a compact,[68] to which Bern and Solothurn were parties, did not prevent Bern's going to the Federal Tribunal to stop the repatriation contrary to the Constitution, as it alleged, of one of its citizens resident in Solothurn. Though Bern mistakenly brought an action of review (*Beschwerde*) of the order of ouster, the court treated it as an original action (*Klage*) and sustained Bern's claim that lack of housing did not warrant repatriation.[69]

As has been said, for violation by a canton not of the Constitution but of the concordat, another *canton,* whose citizen is thereby affected, may not resort of the Tribunal but may obtain redress only by arbitration. But what can the aggrieved *citizen* do? Two cases concerning the 1923 and 1937 revisions of this concordat manifest the court's understanding of his rights.

Bähler-Troller, a citizen of Bern, was resident in Solothurn. The latter canton, on the ground that he had become a public charge through his own misconduct, took steps to deport him to Bern. Bern agreed to receive him, but Bähler-Troller insisted that he was without fault and so sought public law review of the deportation order. By article 13 of the concordat of June 15, 1923, the canton of residence undertook to

[66] See for more detail the Zurich University doctoral dissertation by Max Wild, Die interkantonale Armenpflege auf Grund des Konkordates über wohnörtliche Armenstützung (1927). Though Wild, p. 192, and Gut, p. 57 and 65, argue that to name the Council as arbiter is unconstitutional, this provision was upheld by an opinion of the Department of Justice and Police of, April 15, 1916. Walter Burckhardt, Schweizerisches Bundesrecht (vol. III) no. 973 II. Gut further opines that, apart from arbitration, no concordat could transfer intercantonal legal controversies from the TF to the CF. Gut, p. 58, n. 35. (Since exception from the TF's general power to adjudicate cases between cantons is allowed by Const. art. 113, par. 2 for "administrative disagreements designated by federal legislation," the Federal Assembly by legislation can substitute the CF for the TF as judge, whether or not cantons by compact may do so.)

[67] Gut, *op. cit.,* 66, believes that the naming of a department as determiner of controversies violates Const. art. 103 and Administrative Organization Act art. 23, because there is no provision for review by the Federal Council, and none by the Administrative Court (i.e. the Federal Tribunal in this capacity), Const. art. 114bis. But the Tribunal, in mentioning the existence of these provisions, has said nothing to disparage them.

[68] This was the earlier compact of January 9, 1920.

[69] . . . "Const. art. 45 par. 3 does not refer to every sort of public assistance . . . The inability [of the recipient to fend for himself] must be the consequence of *poverty,* the lack of money . . . so that the community that gives assistance must bear the expense itself and can not recover it from the recipient . . . But there is no doubt that the present lack of housing of the S family is not due to inability to pay rent—it has so far always paid it—but because landlords refuse to lease due to the characteristics of certain members of the S family (and perhaps because of the large number of children) . . . The fact of lack of shelter, whether or not due to fault, can not be the basis of deportation and repatriation under art. 45 par. 3 . . . It is the duty of the canton of residence, or, if the internal cantonal law so provides, the town, to take the steps necessary by reason of the circumstances to the same extent and under the same conditions as if a citizen of the town were involved . . ." Bern v. Solothurn, 49 TF I 330, at 339–341, 1923 Praxis no. 120 (emphasis in original).

support indigent confederals, unless their need of support was due to their fault, and renounced the right to deport them, as permitted by article 45 of the Constitution, while article 20 provides court review to citizens.[70] The court examined the framing of the concordat, which showed that article 20 was added to give the deportee access to the Tribunal under article 175 par. 3 of the Judicature Act (now art. 84 par. 1), to protect himself from violation of his constitutional rights, and concluded:

> From this history of the drafting of art. 20 it follows that only action of review based on article 45 of the Constitution was intended to be available to the deportee . . . not [this sort of action] which is founded on article 13 of the concordat.[71] 61 TF I at 199.

Much the same issue was presented, under the concordat of June 16, 1937, in *Canonica v. Baselstadt*.[72] Canonica was a citizen of Ticino, resident in Basel. He had received public assistance during periods of unemployment, which by Basel law was not counted as poor relief.[73] He also had obtained a little assistance from both Basel and Ticino that was poor relief. The Basel Wardship Council decided that his four older children were neglected. So it took them from the parents' custody. Basel then demanded that Ticino pay for the children's care in foster families and institutions, relying on the fact that the compact

[70] "The question whether a violation of art. 13 of the concordat may give rise to an action of review [by the person affected by the order challenged] depends on the meaning that is to be attributed to the express renunciation in principle in art. 13 par. 1 of the exercise of the right to expel those who become public charges. If the cantons intended to renounce *in favor of their citizens* [i.e. each canton in favor of the citizens of other cantons] the right they had to repatriate under Const. art. 45 par. 3, then the deportee could attack an order in violation of art. 13 . . . But if the cantons intended to renounce *only each in favor of the other*, then no such right exists in the deportee . . .

Which of these possible meanings should be given the concordat . . . can not be determined from the text alone. Art. 13 speaks indeed of renunciation *with respect to* (*gegenüber*) the citizens, but this does not necessarily imply that the renunciation is to be *in favor of* (*zugunsten*) the citizens . . . And when art. 20 provides court review to citizens, this does not necessarily provide review for violation of art. 13. *Against* [such a reading] is the fact that according to art. 19 controversies between cantons concerning art. 13 are to be finally adjudicated by the Federal Council as arbitrator. [As this might result in conflicting determinations of the Council and the Tribunal if review by the latter were open to the deportee, this interpretation would not be sensible.] Nor is this interpretation necessary." Bähler-Troller v. Solothurn, 61 TF I 194, at 196–198, 1936 JdT I 90.

The French text, not mentioned by the court, says *"renunciation"* without more. (As no French-speaking cantons were original parties to the concordat, the German text is probably the more significant.)

[71] Two additional paragraphs are reported in JdT; these say that the plaintiff may prevent execution of the deportation order if he can show that he is not in *permanent* need of support, as deportation then would violate Const. art. 45.

[72] Canonica v. Urban Basel, 66 TF I 27, 1940 JdT I 342.

[73] As to what *sort* of assistance is such that receipt of it justifies the recipient's deportation (unless it is reimbursed by the recipient's home canton), see Python (note 14).

for support at residence, to which both cantons adhered, excepted persons who were at fault in creating the need of support. Ticino refused to support the children in Basel but was agreeable to their being sent to Ticino. Basel thereupon decided to expel the whole family. Mr. and Mrs. Canonica sought review on the ground that they were not permanently in need of assistance and even if they were, they were not at fault and so could not be deported. The court referred to what it had said in *Bähler-Troller v. Solothurn* about the very similar concordat of 1923 and continued:

> . . . The citizen ordered repatriated, now as before, can attack the order only for violation of his *constitutional* rights . . . Const. art. 45 . . . or other provisions (e.g. art. 4 . . .). This was the only meaning the TF gave to art. 20 of the earlier concordat, which, besides providing for arbitral decision by the CF of controversies between party cantons concerning meaning and application of the agreement, reserved "public law review by citizens of such cantons pursuant to the Judicature Act art. 175 no. 3" . . . [In the 1936 concordat] this language of art. 20 is repeated word for word. If some broader meaning had been intended, undoubtedly this would have been expressed in view of the Bähler-Troller case. 66 TF I at 32–33.

The claim under article 13 of the concordat having been thus found unavailable to the plaintiff, the court turned to the other claim that, within art. 45 of the Constitution, the Canonicas were not permanent public charges. What must be shown, said the court, is a need likely to continue:

> The 55 francs that Canonica received from Basel as poor relief in 1939 is too small to constitute proof of presently continuing dependency . . . [Support of the four children would be, if Ticino had refused support. But the offer of Ticino to support them there] was a sufficient proffer of aid in the sense of Const. art. 45 par. 3. . . . After the decision of the Wardship Council . . . to take the children from their parents, it alone had the power to decide how they should be cared for. [The parents' control is ended. And since] the public welfare authority of the canton of residence will be just as fully relieved [by transfer of the children to Ticino] as if the home canton reimbursed the canton of residence for its expenses[74] [and since there is no showing that the rest of the family

[74] The court declared that it need not consider whether the home canton could prevent family deportation by offering care in the home canton for children *not* separated from their parents by the canton of residence. Such separation is expressly authorized by art. 3 par. 1 of the Concordat on Support at Place of Residence "where the husband and the wife or the parents and the children have not the same cantonality." Schaffhausen v. Thurgau, 66 TF I 165, 170, 1940 JdT I 563, 566.

> will be a permanent charge on Basel, the expulsion order must be cancelled].
>
> That Ticino has raised no objection to the expulsion has no importance in ruling on the constitutional rights of the persons concerned. If Canonica should hereafter become in permanent need of assistance, Basel is free to make a new order of expulsion. At present the grounds are inadequate. 66 TF I at 33–37.

The latest cases reiterate the settled law and underscore the irrelevance of this compact to litigation before the Tribunal. In *Bern v. Geneva*[75] the court gave judgment for the plaintiff canton, applying the rule that a needy confederal who is resident in the canton where he becomes *temporarily* ill and in need of assistance must be cared for by that canton, though he is transportable (or even, as in this case, actually transported) to his home canton, the home canton's duty being to shoulder the burden only of *permanent* relief. It noted the fact that the two cantons had formerly been parties to the compact relating to support at residence. In *Valais v. Zurich*[76] it held that the home canton (Valais) could prevent deportation of its citizens from their canton of residence (Zurich) except pursuant to the constitutional exceptions to the general constitutional right of the Swiss to reside anywhere, a rule which protects both the individual and his home canton. In giving Valais the declaration it asked and denying recovery of expenses claimed by Zurich, the court relied on *Bern v. Solothurn*[77] and noted that "not both cantons (Valais and Zurich) are parties to the concordat of July 1, 1937 concerning care by the place of residence; and its arbitration clause therefore does not stand in the way"[78] of adjudication by the court. Nor would it have even if both had been parties.

On the small foundation offered by article 45 of the Constitution, the Swiss Federal Tribunal has built a considerable body of intercantonal law. As it said recently in *Uri v. St. Gallen*:[79]

> Article 45 of the Constitution, besides providing a personal right for the benefit of individual citizens,[80] also ordains legal relations between the canton of residence and the canton of origin. 80 TF I at 181.

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[75] Bern v. Geneva, 66 TF I 63, 1941 JdT I 13.

[76] Valais v. Zurich, 71 TF I 233, 1945 JdT I 578.

[77] Note 69.

[78] 71 TF I at 237. The residence-support compact was mentioned also in Luzern v. Neuchâtel, 73 TF I 230, 236, 1948 JdT I 47, 51, and Geneva v. Bern, 74 TF I 553 (not reported), 1949 JdT I 251, but was not binding in either case because not adhered to by both cantons.

[79] Uri v. St. Gallen, 80 TF I 178, 1955 JdT I 181. Here the opinion indicated that the residence-support concordat may indirectly affect adjudication by the Tribunal.

[80] Moreover, treaties and natural (international?) law, we have seen, are held to give such rights against cantons also to aliens and to other cantons with respect to aliens. May it be inferred that a foreign country also might recover from a canton that failed to fulfill such a duty with respect to a national of that country?

Such intermeshing personal and governmental relations—which Professor Jessup might call transcantonal law[81]—could well be developed on the legal plane in other federal countries either by federal legislation (or constitutional amendment if necessary), or by interstate compact, or simply by judicial recognition that transfrontier claims for public assistance are no less legal in nature when the frontier is a state (or a national) boundary than when it is a town or county boundary.

Swiss experience suggests that in the United States it would be beneficial to enlarge our notions of interstate claims susceptible of settlement by suit. If this increased volume of business would overload the Supreme Court, interstate compacts (perhaps nationally promoted), like Swiss concordats, could create not only rules but also methods of interstate settlement, if necessary by setting up new specialized administrative or judicial agencies.

[81] "I shall use, instead of 'international law,' the term 'transnational law' to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories." Jessup, Transnational Law, (1956) 2. I have objected, in reviewing this fine book, 10 Am. J. of Leg. Ed. (1957) 122, to the misguiding term "transnational," and again propose metademic, transfrontier, or common, as used by Wilfred Jenks, The Common Law of Mankind (1959).

J. DUNCAN M. DERRETT

The Hindu Succession Act, 1956: An Experiment in Social Legislation

The statute to be discussed here has not yet been amended by Parliament or by any of the States of India, which have legislative power concurrently with Parliament[1] to amend the various personal laws, which will govern the family relationships of Hindus, Muslims, Parsis, and (to a very small extent) Jews and Christians until the promised Indian Civil Code is enacted.[2] This portion of the 'Hindu Code' came into force on the 17th of June, 1956, and has thus had more than three years of life, during which its embarrassing and (to some critics' eyes) deleterious features have been amply exhibited, and might have been expected to inspire effective criticism by now. Notwithstanding the introduction of the abortive central Bills Nos. 42, 43, 45, and 54 of 1958, which sought to amend or supplement our Act, the general public who are affected by it seem at present neither overtly nor violently dissatisfied.

The theme of this article is this apparent quiescence. From a practical point of view, what have Indian Hindus to be satisfied with? From an academic point of view, ought they not rather to regret a wasted opportunity? As the first stage on the road towards the succession part of the Indian Civil Code, does it inspire confidence? A critical and comparative appraisal of this remarkable statute could be founded on several distinct lines of investigation, but for the present we may attempt to answer these questions with a double motive: let Indian legislators see their efforts as others see them; and let them appreciate that sympathetic assistance is ready to hand, and that the indifference which they showed towards the learning accumulated by comparative lawyers before 1956 may not have been an acceptable precedent.

It has already been pointed out that, however odd a modern statute law of succession to deceased Hindus might turn out to be, the pre-existing law was immeasurably worse.[3] There is no doubt but that

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[1] Constitution of India, Seventh Schedule, List III, no. 5.

[2] *Id.*, Art. 44.

[3] J. D. M. Derrett, Hindu Law Past and Present, Calcutta, 1957, esp. chapters 1, 2. The Anglo-Hindu law's background and many of its details are to be found in the encyclopaedic P. V. Kane, History of Dharmaśāstra, Poona, 1930–58 (5 vols. in 6 pts. have appeared) esp. vol. 3. See also J. D. Mayne, Hindu Law and Usage, 11th ed. N.

Parliament was alive to this, and felt that any codification and amendment would be better than none. This spirit led them to refer the ultimate draft Bill to a Select Committee which contained neither outstanding Hindu lawyers nor comparative lawyers,[4] to consult an inadequate bibliography of published material on topics to be dealt with in the Act,[5] to make passing references in debate to Russian and Chinese family laws and to the English Inheritance (Family Provision) Act, 1938, but to compile no comprehensive survey or parallel tables for their guidance, and to amend the text of the Bill in both Houses of Parliament upon the spur of the moment, as if speed were the main concern.[6]

The text of the Act as passed is so misleading to a newcomer to the subject that an exceptional degree of explanation is needed merely to depict its present effect. Yet even here commentators have reached widely differing opinions,[7] and the High Courts have yet to deal with many patent as well as the anticipated latent ambiguities, so that we are left to our own devices, even at this late stage, to a quite remarkable extent. It will be necessary to depict, in outline, the pre-existing law,

Chandrasekhara Aiyar, Madras, 1951 (repr. 1953) and D. F. Mulla, Principles of Hindu Law, 12th ed. S. T. Desai, Bombay, 1959.

[4] For the earlier history of the Bill see Derrett, above, and the introd. to the Bibliography (note 5 below). H. K. Shah, "History of the Hindu Code," 60 Bom. L. R. (J.), (1958) 81–4. The Hindu Succession Bill (no. 13 of 1954), publ. May 26th, 1954 in Gaz. of India Extraord., Pt. II, Sec. 2, pp. 339–59; referred to Joint Committee of both Houses (ref. to as "Select Committee") July 25th, 1955; Report of Joint Committee presented Sept. 19th, 1955, publ. Gaz. of India Extraord., Pt. II, Sec. 2, pp. 365–409. The Chairman was the Minister for Legal Affairs, Sri H. V. Pataskar, who had never held judicial office and is not known to have written (at any rate in English) on Hindu law. There were 45 members, and their report was subject to 11 long minutes of dissent. The annexed Bill differed in places fundamentally from the Bill referred to the Committee.

[5] Bibliography on the Hindu Succession Bill, 1954 (Biblio. no. 28), Lok Sabha Secretariat, New Delhi, July 1955. Numerous articles of comparative legal interest are omitted. In February, 1955, a series of 12 lectures was given in the University of Calcutta on testamentary and intestate succession with special reference to that topic as under discussion in India. The lectures assembled comparative material in an effort to explain the history of the Hindu law and criticize constructively the Hindu Succession Bill. They were widely publicized and well attended, but no effort was made to bring the material to the attention of Parliament or its Select Committee.

[6] Parliamentary Debates. Rajya Sabha. Official Report, Vol. XI. See 24th Nov. 1955–30th Nov. 1955. The Debates in the Lok Sabha, reported in its own Official Report (see 27th April 1956–8th May 1956), are also available in summary (Synopsis of Lok Sabha Debates, Pt. II, xiith Session, New Delhi, 1956). It is to be noticed that, unlike the United States, India follows the English rule that a statute must not be construed by reference to the report of a Parliamentary committee or the debates of the legislature, unless (in very rare instances) it is essential to resolve an ambiguity as to the legislature's intention, where this question is relevant and inescapable, and no other canon of construction produces an answer.

[7] Mulla, ed. S. T. Desai (above); R. N. Sarkar, Hindu Code, Calcutta, 1957; R. B. Sethi, The Hindu Succession Act, Allahabad, 1959 (2d ed.); D. H. Chaudhari, The Hindu Succession Act, Calcutta, 1957 (2d. ed.); S. Venkataraman, "The Hindu Succession Act, 1956: a Study," (1956) 19 Sup. Ct. J. (J.), 195f.; Paras Diwan, "The Hindu Succession Act," 19 Sup. Ct. J. (J) (1956) 251f.; J. D. M. Derrett, "Some Problems arising under the Hindu Succession Act, 1956," 59 Bom. L. R. (J) (1957) 33, 49, 68f.

so that we can judge how far the "improvement" may give cause for satisfaction, and this may more conveniently be done as each topic arises. Our guesses as to the statute's meaning may then be significant, and the upheaval which it plainly promises for nine tenths of the Hindu population of India can be apprehended. We may approach the task under the following heads: the statute's applicability to persons and to property; the general scheme of testamentary and intestate succession; disqualifications and limitations upon the right of heirship; and miscellaneous matters. The general history of the project of codification, and the disquiet to which it has given rise on several grounds, have been outlined elsewhere.[8]

The Application of the Act to Persons and to Property

To those who fear the application of the Act to the distribution of the estates of intestate decedents, some commentators have announced that the Act does not apply to agricultural land, which remains, on the whole, the most significant item of wealth in private hands.[9] In section 4(2) we are told, "For the removal of doubts (*sic*) . . . nothing contained in this Act shall be deemed to affect the provisions of any law . . . providing . . . for the devolution of tenancy rights in respect of such (agricultural) holdings." But this appears to mean that where a State has a statute specially regulating the devolution of tenancies, i.e., the holdings of land direct from the State as landowner and receiver of land-revenue, that type of property will devolve according to the statute in force for the time being (which normally reflects general customary laws rather than any particular personal law) and not according to the Act itself. It is left for the States which have such statutory provisions to bring their tenancy laws into step with the Act. Many States are affected.[10] Another view, which at the time of writing awaits judicial support, sees in this provision a further protection for anti-fragmentation statutes, a motive already referred to in the subsection itself (words omitted above—see note 52 below).

To this quite substantial exemption from the Act must be added estates descending to a single heir according to the terms of agreements

[8] Derrett, Hindu Law Past and Present (above); see the same, "The Codification of Personal Law in India . . . ," 6 I.Y.B.I.A. (1957) 189–211; "Statutory Amendments of the Personal Law of Hindus since Indian Independence," 7 Am. J. Comp. L. (1958) 380–93, and the General Report on Topic I-E-1 (same title) for the Brussels Congress of the International Academy of Comparative Law (1958) printed in British Legal Papers . . . , London 1959, 325–44.

[9] R. N. Sarkar and others, misled by statements in the Rajya Sabha.

[10] Extraordinary confusion prevailed on this in Parliament. It was actually imagined that the (excluded) females would retain their rights under the general law but would be refused access to the actual tenancies in question: Rajya Sabha Report, col. 611 and following. Punjab Tenancy Act and Assam, U. P. Bihar, and Hyderabad statutes were referred to. How the subsection works is illustrated in Sitabai v. Kothulal (1957) 60 Bom. L. R. 408.

entered into between the Government of India and the (former) Rulers of States whose status was affected by the amalgamations which preceded the consolidation of the Union of India, certain other small classes of estates,[11] and the very important class of property known as interests in Mitakshara coparcenary property, under certain circumstances which require careful explanation.

It was the intention of the framers of the original project that all property (saving—at that stage—that of matrilineal joint families in Malabar) should be subject to the same law of succession. The driving force was not so much to "tidy up" the disordered and inconsistent mass that were the rules of the Anglo-Hindu law, though this academic aim was present, as to place women upon an approximately equal footing in respect of property rights with men. The greater part of India was governed by the *Mitākṣarā,* a twelfth-century textbook,[12] as interpreted according to certain later authorities and the judicial decisions of Anglo-Hindu law. This authority prescribed that ancestral property and accretions thereto should not pass by succession to the widow, the daughter, the daughter's son, and subsequent agnatic and cognatic heirs unless the decedent died without son, son's son, or son's son's son, and in a state of "severance" from his co-owners (called in current terminology "coparceners") and, of course, not having "reunited" with them so as to form once again a "joint family." The history of this particular rule, which was an artful solution to intense difficulties of reconciliation of ancient texts and current practice,[13] is beyond the scope of this paper. But the result was that if severance had not taken place the agnates who survived the decedent and were "joint" with him took all that he had had, took, as is said nowadays somewhat inaccurately, by survivorship, to the exclusion of the widow, who had merely rights of maintenance against the joint family property, valuable as these no doubt were.

The right of a Mitakshara coparcener to merge his self-acquired property with the joint family property being widely recognized,[14] any attempt to reform Hindu law could be frustrated if either (a) the Mitakshara coparcenary were not abolished or (b) the coparcenary interest were not made subject to the same reformed rules of distribution as the unmerged self-acquired property. The original solution proposed by the first Hindu Law Committee was to abolish the Mitakshara coparcenary, and to substitute for it another form of tenure native to

[11] Section 5 (ii) "any enactment"—the Minister for Legal Affairs confessed he did not know which was being saved by the provision: Rajya Sabha Report, col. 655. Also 5 (iii), a particular estate in Cochin.

[12] Translated by H. T. Colebrooke in Two Treatises on Inheritance, published Calcutta 1810 and many times subsequently.

[13] For a compendious treatment, Derrett, "A Strange Rule of Smrti and a Suggested Solution," J.R.A.S. (1958) 17–25.

[14] Lal Bahadur v. Kanhaia Lal (1907) L.R. 34 I.A. 65, I.L.R. 29 All. 244.

India, that named after the textbook, the *Dāyabhāga* of Jīmūtavāhana (12th cent.), which expounded it, and having much in common with Anglo-American tenancy in common. On the death of the coparcener, then, his share would pass by succession like any other property. But the actual decision taken was that the Mitakshara coparcenary should continue, provided that no one of the favored females, or the daughter's son, survived the decedent.[15] Consequently, when any Hindu dies owning an interest in Mitakshara coparcenary property this interest may still occasionally pass by survivorship, and to the extent that old coparcenaries have not been broken up by deaths, and new coparcenaries may still be formed,[16] the old Anglo-Hindu law relating to the joint family will continue.[17] Close female relations will no longer, however, be at the mercy of the decedent's agnates.

Hindus who have married either under the old Special Marriage Act, or that of 1954 which replaced it, form a privileged class, in that their property and that of their children (however these latter may have married), but not apparently of their grandchildren, pass not under the Hindu Succession Act,[18] but under the Indian Succession Act, 1929, which groans under accumulated oddities and anachronisms, and is overdue for revision.[19] It is fashionable to regard this as a system of law to which all enlightened Hindus should wish to conform.[20]

On the other hand, while in consequence there are some Hindus to whom the Hindu Succession Act does not apply, there are some non-Hindus to whom it does apply. For the Act cuts through the jungle of judicial distinctions between Hindus who have abandoned many non-Hindu usages and customs but are recognizably Hindu for the purposes of the application of the personal law, and tribal peoples who have adopted some Hindu usages and customs but have not yet become "Hindus,"[21] and prescribes that all who are not Muslims, Christians, Parsis, or Jews are governed by the Act, unless they would not have been governed by the Hindu law or by any custom or usage as part of that law[22] if the Act had not been passed—this may exclude Chinese Confucianists, for example. Buddhists from the Himalaya region *are*

[15] Section 6, proviso. See G. K. Dabke at 60 Bom. L. R. (J.) (1958) 8f.

[16] Apparently by an oversight a son, for example, succeeding to his father will hold as a Mitakshara coparcener with his own son, since the latter's birth-right has not been abolished.

[17] Its greatest strength lies in a fundamental "communistic" attitude to property, and in the legal powers of the "manager" (on whom see Mulla, sections 236 and following). In 1955–56 the intention to codify joint family law was apparent; it has now been abandoned.

[18] Section 5 (i).

[19] See sections 9, 10 (domicile), 33, 33A (spouse and issue), 42, 43 (father excludes mother), 48 (no limit to the degrees of kindred who may take).

[20] Rajya Sabha Report, cols. 643–6.

[21] Fanindra v. Rajeswar (1885) L.R. 12 I.A. 72, I.L.R. 11 Cal. 463; Ganesh v. Shib (1932) 11 Pat. 139.

[22] A mistake: custom derogates from the personal law, it is not a part of it.

Hindus for this purpose, and so are children of mixed marriages and illegitimate unions if they are "brought up" as Hindus. No religious qualification as such is contemplated.[23] Scheduled Tribes are for the present exempted from the Act, but it is fair to add that the provisions of the Act would be no more strange to them than to many of the Hindu castes to whom it does apply.[24]

Quite the most extraordinary part of the Act is its attempt to bring matrilineal and patrilineal peoples, formerly governed by various schools of law and various customs, under what is virtually a single system. Even in the *Code Napoléon* and the Civil Code of Imperial Germany no task of equal magnitude was undertaken. The patrilineal peoples have made some concession, for they have included the mother within the relations in the first class of the Schedule, to be a simultaneous heir with the widow, the son, the daughter, and the rest.[25] This turned out to be unnecessary, since special provisions were inserted at a later stage to enable matrilineal peoples to enjoy a slightly modified scheme of succession both to males and to females. This was by far the greatest concession made by the representatives of the matrilineal castes.[26] Their new scheme of succession, which is basically the general scheme, does not correspond to any scheme in existence prior to the Act, and fundamentally ignores the essence of matriliny.[27] Moreover, when any member dies his interest in the joint family will pass by testamentary or intestate succession in any circumstances,[28] unlike the Mitakshara coparcenary interest which only so passes in certain (admittedly common) circumstances. Thus, the destruction of the legal foundation of the characteristic *tarwad* and *tavazhi* of the Malabar joint family is immediately threatened, and unless members are scrupulous to make suitable testaments this institution will soon disappear.

The General Scheme of Succession

Testamentary Succession. The Act gives no hint as to the power of testamentary disposition which a Hindu male or female possesses, though the Hindu Adoptions and Maintenance Act, passed a little over six months after the Hindu Succession Act, throws an indirect and

[23] Section 2 (3). The rule was foreshadowed in Anglo-Hindu law: Nalinaksha v. Rajani (1931) 58 Cal. 1392.

[24] Section 2 (2). Those formerly subject to the Cochin Makkathayam Thiyya Act, Act XVII of 1115 M.E./1940 A.D. will have found our Act not merely strange but even retrogressive.

[25] Class I of the Schedule. Synopsis of Loka Sabha Debates (above), p. 192 (7th May, 1956).

[26] Section 17 modifying the effects of sections 8 and 15.

[27] Property should descend to females and to the descendants of females in the female line only. Departures from this had begun to be made in Madras State, but they were hardly representative. "The future of Malabar personal law within the Framework of the Projected Hindu Code Bill," Kerala L.T. (J.) (1952) 9–20. Derrett, Hindu Law Past and Present, 247–53.

[28] Section 7.

somewhat obscure light on the question. We are left with the impression that the power remains as it was before, subject, as regards its extension, to the necessary warning that the former hindrances to *direct* testamentary disposition of the coparcenary interest at Mitakshara law are no longer to serve as excuses for depriving legatees of benefits out of property held jointly—for the interest is specifically stated to be alienable by will.[29] It is most noticeable that just as local statutes may prevent the Act's application to agricultural tenancies of a particular type, so the *proportion* of joint family property which may pass under a will or by intestacy will vary according to the High Court which is seized with the case. The Act is silent, once again, on this point of great practical importance. The Anglo-Hindu law fell into a veritable morass of distinctions here.

The share taken by a coparcener at a partition by metes and bounds,[30] which is in point here,[31] depended not merely upon the extent to which debts and claims for future maintenance, funeral expenses, and the like might diminish the fund available for distribution, but also upon the number of females who might claim a beneficial share. Where the partition is between a father and his sons, his wives are each entitled to a share; where between sons after the father's death, their mother is entitled; where between a son and grandson by a predeceased son, the grandmother and even step-grandmother is entitled.[32] Yet none of these rights apply in Madras, Andhra, Kerala, and in Mysore with reference to Hindus governed by the so-called Dravida sub-school of Mitakshara law.[33] Even in the remaining jurisdictions it has been held, probably wrongly, that where a woman has inherited under the Hindu Women's Rights to Property Act, 1937 (so that her maintenance is prima facie secured) her rights at Hindu law proper are abrogated,[34] and that where she has inherited at Hindu law proper from one son she is not

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[30] Pratapmull v. Dhanbati (1936) L.R. 63 I.A. 33, A.I.R. 1936 P. C. 20. Sm. Laltabai v. Krishnarao A.I.R. 1959 Madh. P. 100.

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Hindus for this purpose, and so are children of mixed marriages and illegitimate unions if they are "brought up" as Hindus. No religious qualification as such is contemplated.[23] Scheduled Tribes are for the present exempted from the Act, but it is fair to add that the provisions of the Act would be no more strange to them than to many of the Hindu castes to whom it does apply.[24]

Quite the most extraordinary part of the Act is its attempt to bring matrilineal and patrilineal peoples, formerly governed by various schools of law and various customs, under what is virtually a single system. Even in the *Code Napoléon* and the Civil Code of Imperial Germany no task of equal magnitude was undertaken. The patrilineal peoples have made some concession, for they have included the mother within the relations in the first class of the Schedule, to be a simultaneous heir with the widow, the son, the daughter, and the rest.[25] This turned out to be unnecessary, since special provisions were inserted at a later stage to enable matrilineal peoples to enjoy a slightly modified scheme of succession both to males and to females. This was by far the greatest concession made by the representatives of the matrilineal castes.[26] Their new scheme of succession, which is basically the general scheme, does not correspond to any scheme in existence prior to the Act, and fundamentally ignores the essence of matriliny.[27] Moreover, when any member dies his interest in the joint family will pass by testamentary or intestate succession in any circumstances,[28] unlike the Mitakshara coparcenary interest which only so passes in certain (admittedly common) circumstances. Thus, the destruction of the legal foundation of the characteristic *tarwad* and *tavazhi* of the Malabar joint family is immediately threatened, and unless members are scrupulous to make suitable testaments this institution will soon disappear.

The General Scheme of Succession

Testamentary Succession. The Act gives no hint as to the power of testamentary disposition which a Hindu male or female possesses, though the Hindu Adoptions and Maintenance Act, passed a little over six months after the Hindu Succession Act, throws an indirect and

[23] Section 2 (3). The rule was foreshadowed in Anglo-Hindu law: Nalinaksha v. Rajani (1931) 58 Cal. 1392.

[24] Section 2 (2). Those formerly subject to the Cochin Makkathayam Thiyya Act, Act XVII of 1115 M.E./1940 A.D. will have found our Act not merely strange but even retrogressive.

[25] Class I of the Schedule. Synopsis of Loka Sabha Debates (above), p. 192 (7th May, 1956).

[26] Section 17 modifying the effects of sections 8 and 15.

[27] Property should descend to females and to the descendants of females in the female line only. Departures from this had begun to be made in Madras State, but they were hardly representative. "The future of Malabar personal law within the Framework of the Projected Hindu Code Bill," Kerala L.T. (J.) (1952) 9–20. Derrett, Hindu Law Past and Present, 247–53.

[28] Section 7.

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entitled to a share at a partition between two surviving sons.[35] Numerous High Courts may refuse to accept these limitations; but all admit that where a woman has obtained what used to be called *strīdhanam* (woman's peculiar property) from her husband or her father-in-law the amount of her share must be diminished to that extent, or adeemed entirely, as the case may be, to the profit of the other sharers.[36] What portion of joint family property must be deemed to pass under a will may prove a delicate question to determine, involving matters apparently unconnected with the decedent or facts within his knowledge or control.

The Anglo-Hindu law developed, as an integral part of its slow and reluctant admission of 'Hindu wills,' a cautious regard for the rights of those who were entitled either (a) to be maintained by the decedent personally during his lifetime out of (i) any property or (ii) property he had inherited from another person or was enjoying by right of survivorship from another person, or (b) to be maintained out of the decedent's estate by virtue of a moral obligation which he was himself entitled to ignore during his lifetime, but was legally incumbent on his heirs after his death. The wife and the unmarried daughter were examples of the first, and the widow (except where she was allowed to inherit by the Hindu law, by custom, or by statute) and the widowed daughter-in-law of the last category. The widow of a predeceased uncle or brother might exemplify the middle categories.[37]

Since maintainees had no interests in the estate, and since they could not acquire an equity over it unless they applied for a charge to be created over it in their favor for a stipulated sum,[38] the owner of the hypothetically burdened estate could alienate it free of their rights, and could do so equally effectively by sale, mortgage, or gift. Statutory relief was granted to maintainees in two stages, the ultimate result being that whereas a gratuitous transfer (including a legacy) or a transfer for value to a transferee who had notice of the right of maintenance could not defeat the right, and the transferee was bound to provide the maintenance in question, a transferee for value without notice was free of all claims.[39]

The situation is so unlike those known either to Civil-Law jurisdic-

[35] Indu v. Mrtyunjoy (1946) Cal. 128.

[36] See refs. in Baburao v. Savitribai (1952) Nag. 578.

[37] Subbarayana v. Subbaka (1884) 8 Mad. 236 (mother); Gajapathi v. Susi A.I.R. 1940 Mad. 850; Muthalammal v. Veeraraghavalu (1952) 2 M.L.J. 344; D. Rangamma v. D. Chinnatayi (1956) An.W.R. 202; Chandramma v. M. Venkatareddi A.I.R. 1958 An. P. 396 (wife and widow); Savitribai v. Luximibai (1878) 2 Bom. 573 Full Bench; Yamunabai v. Manubai (1899) 23 Bom. 608; Jai Nand v. Parandai A.I.R. 1929 Oudh 251 Full Bench; Ambu Bai v. Soni Bai (1941) Mad. 13 Full Bench; Appavu v. Nallammal (1948) 1 M.L.J. 110 (rights against property—the daughter-in-law).

[38] Ramchandra v. Kamalabai (1944) 46 Bom. L. R. 358; Earamma v. Nathegowda A.I.R. 1954 Mys. 26; Satwati v. Kali Shanker (1955) 1 All. 523 Full Bench.

[39] Dattatraya v. Tulsabai (1943) Bom. 646.

tions or to the various Anglo-American systems that it is worthwhile to point out that the transferee is free even if he is not a *bona fide* transferee for value; i.e., there is no burden of proof upon him to show that he made sufficient enquiry as to the existence of such claims before he purchased.[40] This is because the maintainee has neither a legal nor an equitable right in the estate. It would take too long to describe the court's jurisdiction to assess future and arrears of maintenance, and to review its past awards. The rights of maintainees were substantial, and considerably reduced the apparent fortune of an heir: but they implied dependence, and hence the agitation to increase the number of beneficial heirs.

The whole scheme has been renovated in the Hindu Adoptions and Maintenance Act, 1956, in which a class of "dependants" has been created who have a right to be maintained by the "heirs," which word, it is submitted, includes legatees.[41] These dependants must not have taken "any share" under the will or by intestacy, but it is submitted that this does not mean what it says, for in view of the terms of section 22(4) they should be excluded only where their "share" at least equals what the court would award them for their maintenance. The dependants include parents, widow (until remarriage), minor son or son's son or son's son's son, unmarried daughter, or daughter of pre-deceased son, etc., widowed daughter, widowed daughter-in-law, and minor illegitimate son and unmarried illegitimate daughter. Orders of priority of application for maintenance out of the estates where there are several deceased relatives are provided.[42] The main changes are that the concubine who used to be a life incumbrance on the joint family property[43] has gone, and the illegitimate daughter, who used to be excluded at Hindu law,[44] is included.

The right to be maintained is lost for change of religion by conversion from Hinduism.[45] It is possible that by contracting, for value, to leave his estate to X a Hindu can effectively prevent any claim by dependants, for section 26 says that *debts of every description* contracted or payable by the deceased shall have priority. It is unlikely that Parliament contemplated testamentary contracts, as they are rare in India, as in the Anglo-American world generally,[46] but the words seem clear

[40] Contrast the position of a transferee of a minor's property or of a non-alienating coparcener's property: Hunooman Persaud v. Mst. Babooee (1856) 6 M.I.A. 393.

[41] Sections 21 and 22 (1). Section 22 (2) refers to the obligation of those "who take the estate."

[42] Section 21 (iv)—(vii).

[43] The Act ignores her: *cf.* Akku v. Ganesh (1945) Bom. 216 Full Bench.

[44] Padmavati v. Ramchandra A.I.R. 1951 Orissa 248. Compare A.I.R. 1959 Ker. 319.

[45] Hindu Adoptions and Maintenance Act, 1956 section 18 (3).

[46] One may contract, not to make an heir (*cf.* Erbvertrag), but to leave a specific sum by will: *cf.* Narasayya v. Ramachandrayya A.I.R. 1956 Andhra P. 209 with Thakurani v. Dwarkanath A.I.R. 1953 S.C. 205 where 18th cent. English cases are relied upon. India need not adopt American expedients to circumvent the Statute of

enough. Finally, the rights of dependants may still be defeated by speedy alienations by the heirs to a transferee for value without notice of the rights in question.[47] Though other provisions of the Act are not strikingly dissimilar from those of the English Act of 1938, this last is a far cry from the inescapable liability of the executors or administrators; the difference was inevitable, as judicial administration of decedents' estates in India is still the exception rather than the rule. The heir inherits immediately on the death and if the executor and legatees join they can give a good title equally quickly.

The employment of wills is bound to increase as the public becomes more and more aware of the effect of the intestate distribution laid down by the Act.

Intestate Succession. When valid legacies have been paid, the balance, if any, will (subject to the rights of dependants) pass by intestate succession. There are no forced sharers in the Civil-Law sense, nor persons entitled to dower or courtesy. There are no "homestead" provisions in force. A proportion of the estate will in any case be payable by way of Estate Duty, provided that it is not very small.[48] The order of distribution will differ if the decedent is a male from that applicable to a female's estate. Unlike the Islamic law, the Jewish law, and a Malabar statute, which provide for such cases,[49] the Hindu law does not provide (it never did) for succession to a person of indeterminate sex. The Hindu law contemplated a third order of distribution, namely of the property acquired by a hermit, or ascetic, or perpetual student after his change of status. Our statute does not in fact mention these persons, and it might be thought that the general law would apply to them; Parliament obviously thought them of little importance,[50] but in fact they are numerous and their properties are sometimes extensive. The Anglo-Hindu law would seem to be preserved by the operation of section 4, since the Act applies to succession on death, and the ascetic and hermit have already "died" civilly on their entry into the order in question; the physical death finds them with no natural relatives, but only spiritual relatives—a situation plainly not contemplated by the statute.[51]

Frauds [*cf.* Maddison v. Alderson (1882) 8 A.C. 467 and Corbin on Contracts (1950) §§ 432, 436, also T. E. Atkinson in Ann. Surv. of Am. Law (1953) 689–90] since it was never in force in the *mufassil* and was repealed in the Presidency Towns in 1872.

[47] Sections 27–8.

[48] Estate Duty Act, 1953, amended by Act 33 of 1958.

[49] S. G. Vesey FitzGerald, Muhammadan Law: an Abridgement, London, 1931, 158; Maimonides, Mishneh Torah, xiii, 5, 5, 1–2; Cochin Makkathayam Thiyya Act, section 5 (ii).

[50] Report of Joint Committee, p. 369; Rajya Sabha Report, cols. 1020–1 (Kane's warning ineffective).

[51] Section 4 (1) (a) " . . . any text, rule, or interpretation . . . shall cease to have effect with respect to any matter for which provision is made in this Act." On spiritual relationship see Sital Das v. Sant Ram A.I.R. 1954 S.C. 606, 613.

To illustrate the confused history of succession to males we may take a hypothetical family of eight persons. P dies leaving a son, the son of a predeceased son, the daughter of another predeceased son, a daughter, a predeceased daughter's son, a widow (or widows), a mother, and a father. If his death occurred in 1936, the son and the son of the predeceased son would have taken the property between them as Mitakshara coparceners (or in Bengal and Assam as co-tenants, if they were governed by Dayabhaga law). If in 1938, these two would have been obliged to give one third of P's separate and self-acquired property to the widow or widows, while the latter would have taken all his interest in a Mitakshara coparcenary (if any) subject to a limited estate (see below). If after the 17th of June, 1956, all the persons mentioned *except the father* take in equal shares. That all daughters should take, whether married or unmarried, is a very striking novelty in itself.[51*] Since only a son *and his own son* can now form a fresh Mitakshara coparcenary, and since neither at Mitakshara nor at Dayabhaga law can a coparcenary come into existence amongst a group such as this, no powers exist at law to enable one person to manage this property and generally represent all owners, and difficulties will already have been felt in dealing with this new property situation. Fragmentation is avoided in some States by local laws obliging heirs of small estates to sell, or restrict themselves to portions of the movable property, and our Act specifically preserves these laws.[52]

Most systems of intestate succession make clear distinctions between descendants, spouse, ascendants, and collaterals. It comes as an equal shock to those accustomed to the Civil-Law types and to those familiar with Anglo-American types of distribution to find that the Act mixes the classes apparently without any rational arrangement, and without precedent. The Anglo-Hindu law in general prescribed, after the "male issue," the following order: widow, daughter, daughter's son, mother, father, brother, brother's son, brother's son's son, father's mother, father's father, father's brother, and so on. Agnates came in spurts of three degrees at a time until fourteen degrees inclusive from the common ancestor had been exhausted, and then cognates to within (it is believed) five degrees on both sides of the family tree except where one side consists entirely of males.[53] Variants among the schools inserted some selected cognates amongst the agnates, and admitted the widows of predeceased agnates in succession within a limited number

[51*] Since dowries and marriage expenses are very heavy, unmarried daughters have always had a preference in succession to males and females alike. India has (it is not known why) never adopted for Hindus the rule of collation or hotchpot in respect of advancements [*cf.* the English Administration of Estates Act, 1925, section 47 (1) (iii), also H. I. Elbert in 51 Mich. L.R. (1953) 665] and the want of this useful and equitable rule may cause much hardship as advanced and unadvanced daughters compete on equal terms. The point was raised in 56 Bom. L. R. (J.) (1954) 101.

[52] Section 4 (2).

[53] Ramchandra v. Vinayak (1914) L.R. 41 I.A. 290, I.L.R. 42 Cal. 384.

of degrees after the sub-class consisting of their own husbands.[54] All the schools showed signs of a pronounced bias in favor of agnatic heirs and heirs through males and on the father's side. Some High Courts would not admit female cognates, and the Dayabhaga school recognized only five female heirs, of whom the sister was not one, nor the daughter's daughter. In our Act the bias still survives, but it does not seem to justify the following order:

Class I (taking simultaneously and equally, except that representatives of a predeceased descendant share his or her hypothetical share); son, daughter, widow, mother, son of a predeceased son, daughter of a predeceased son, son of a predeceased daughter, daughter of a predeceased daughter, widow of a predeceased son, son of a predeceased son of a predeceased son, daughter of a predeceased son of a predeceased son, widow of a predeceased son of a predeceased son.

Class II (each sub-class excluding the subsequent sub-classes):

I. father; II. son's daughter's son, son's daughter's daughter, *brother, sister;* III. daughter's grandchildren; IV. brother's children and sister's children; V. father's parents; VI. *father's widow* and *brother's widow;* VII. father's brother and sister; VIII. mother's parents; IX. mother's brother and sister.

Next: agnates without limit of degree; then cognates without limit of degree; then (optimistically) the Government of India.[55]

The characteristic serial order of distribution, allowing relations of the same degree but differing relationship, such as the brother's son's daughter and the sister's son's daughter or brother's daughter's daughter, to share the estate only in the remotest reaches of the order, is here preserved;[56] but the order itself makes no sense to any traditionalist, though some anomalous elements can be explained in terms of the compromises which the reformers were obliged to make during the original Bill's progress through Parliament.

At the end of the Schedule there appears the following: "references (here) to a brother or sister do not include references to a brother or sister by uterine blood." The reason was that whereas consanguine half-brothers were traditionally almost as near as full brothers, in patrilineal families the uterine relations were virtually strangers. The classical jurisprudence ignored the fact that many widows remarried (an improper act from the orthodox standpoint), and thus cast hardly a

[54] The last a view of the Mayukha sub-school: Mulla, section 72.

[55] Sections 8 and 29. The wording of the latter section ("such property shall *devolve* on the Government") was due to awareness of the difficulty that may arise in private international law if the State claimant takes *jure regali* and not as an heir: State of Spain v. Treasury Solicitor (1954) 2 W.L.R. 64 (C.A.). This is an instance of India's profiting from English experience.

[56] It should be observed that a nearly Western system of distribution was enacted in the Cochin Makkattayam Thiyya Act (above) but its value as a precedent was totally ignored.

glance at uterine half-blood. Now that divorce and remarriage are completely habilitated in the modern Hindu system the relegation of uterine half-blood seems oddly traditional. But it will work strangely. Because she is mentioned in the Schedule, the mother's sister does not include a uterine half-sister of the mother, who takes (if at all) as a cognate. On the other hand, the mother's uterine half-sister's son is not mentioned in the Schedule, and in case he comes into competition with a mother's full sister's son he will take equally with him in preference to a mother's consanguine half-sister's son, for the Act lays down a general rule that (consanguine) half-blood always takes immediately after full blood.[57] On the subject of half-blood a further remark will be made below.

Both in succession to males and in succession to females, female heirs are now at a great advantage compared with their position before the Act. Formerly these took (in most schools) subject to a limited estate which, although it was more valuable than a life estate, placed serious restrictions on the female holder's dealings. Her transferees could have quiet possession beyond her lifetime (or the time when she forfeited for remarriage, or surrendered) only if the transfers were for necessity or for the benefit of the estate itself or for the deceased husband's or predecessor's spiritual advantage.[58] Since the purchaser normally bought lawsuits into his bargain he was not prepared to pay the market price for the land. Indian women viewed these restrictions (which were intended originally for their advantage) as outdated handicaps, and the Act makes it clear in section 14 that female heirs or legatees will always take as absolute owners unless the testator provides otherwise. This produces consternation because property of one family will now be able to be transferred to another, and perhaps a competitor family by a widow's remarriage. There is no way of stopping this unless the decedent in his will subjects his female beneficiaries to the old limitations. In some parts of India and in some castes women were excluded by custom, and these customs have been removed at one blow. Adjustment to the new situation cannot be speedy, and in the meanwhile some hardship is to be expected.

Succession to females has been remodelled.[59] Section 15(1) gives the property on intestacy to the children and children of predeceased children (but *not* grandchildren whose parents and grandparents are dead, a strange omission in a land where very aged female decedents are common who have had their children when they were in their teens) and also to the husband. This is an innovation, since he was always postponed to issue in the past. Next come the heirs of the husband, i.e., those upon whom the property would have devolved if the decedent

[57] Section 18.
[58] Mulla, chapter XI, sections 166–211.
[59] Section 15; *cf.* Mulla, chapter X, sections 145–164.

had been the husband; then the parents equally; then the father's heirs; lastly the mother's heirs. Then come two unique provisions. Whatever the female decedent "inherited" (it is submitted that this should not include legacies) from her parents must go in the absence of the issue mentioned above not to the husband or his heirs, but to the *heirs of the father*. As a living person has no heirs we must (to avoid an absurd result) give the property to the father when he in fact survives and it was inherited from the mother. Similarly, when property is inherited from the husband or father-in-law it must pass to the *heirs of the husband*, i.e., (it is submitted) to the husband or his heirs. We need not enlarge on the difficulty of deciding whether property from a first father-in-law will go to the last husband. These provisions derive from the traditional Hindu jealousy of allowing property to be transferred indirectly from one family to another through the medium of a female given in marriage from one to the other. This splitting of the estate and multiplication of the number of heirs that may be liable to maintain dependants should prove more inconvenient than it is worth. If the "limited estate" could be abolished, this, one would think, was equally fit for being excluded, and in fact it was intruded into the Bill at the very last moment: it had not occurred to any of the Select Committees.

Disqualifications and Limitations upon the Right of Heirship

If a father's widow has remarried before the death of the decedent she is not thereby disenabled to inherit; but a son's widow and a brother's widow are disqualified.[60] This is an anomalous attempt to represent a traditional rule. Where a son has separated from his father, both being members of a Mitakshara coparcenary, and the father accumulates a large fortune and dies, the other sons who remained joint with their father will share in it, if it has been merged with the joint family estate, and so will the female relatives mentioned in Class I of the Schedule (see above), but he will be excluded completely. This is an antique (and mistaken) rule improperly embalmed.[61] If a Hindu relation becomes a Muslim or a Christian he may still inherit (for an Act of 1850 dealing with loss of caste and change of religion is still respected), but his descendants, being Christians, cannot inherit from their Hindu relation. This goes contrary to the customs of castes in Malabar which experienced this type of claim frequently, and has been enacted[62] in spite of the rule that Hindus may succeed to their Christian relations under the Indian Succession Act. The really important disqualification in Hindu eyes, that a widow shall not inherit if she is

[60] Section 24.
[61] See (1956) 19 Supr. Ct. J. (J.), 103 f.
[62] Section 26.

unchaste at the time the succession opens, is abolished.[63] The murderer or abetter of a murder is disqualified from taking not only the property of the murdered decedent but also any property in furtherance of the succession to which the murder was committed.[64] This is a satisfactory rule which deserves imitation. No effort has been made to deal with the problem of the murder of a co-tenant, upon which much had been written by the time the Act was passed.[65] The ancient disqualifications known to the Dayabhaga school (e.g., the blind, leprous, deaf-and-dumb) are abolished, and also the last surviving disqualification of the Mitakshara school (the congenital lunatic or idiot). It is no longer believed, apparently, that such heirs are better served with a right to maintenance than by a beneficial share, which, after all, someone has to manage for them.

We have seen how heirs' benefits may be cut down in order to satisfy dependants. In other respects also, the heirs may find their shares hedged about with restrictions. These are all new, and have been imposed as a sop to those who fundamentally disapproved of the changes brought about by the general scheme of distribution. Hindus do not like to face the possibility that a son-in-law or a brother-in-law may be entitled to live with them in their own house. Where in India one member of a family comes in other, sometimes quite remote, members are soon to be found and are difficult or impossible to evict. Hence when daughters and sisters were given intestate shares which might include an interest in a dwelling-house Parliament provided that (a) they should not have a right of partition of the house until the male heirs (or heir?) consented to a partition, and (b) they should not have a right of residence in it unless they were widowed, unmarried, deserted by or separated from their husbands![66] Splitting immovable property, such as a block of flats or a farm, and carrying away a share at the behest of her husband or (to be more practical) his parents, a daughter-heiress (or for that matter even a son) could disrupt her (or his) own family's affairs. The same applies if they are business people; their capital, if it had to be called in in order to be partitioned or alienated, might be very adversely disposed in the meanwhile. Thus no heir, male or female, can now insist upon transferring an interest in immovable property or a business. The co-heirs must be given an oppor-

[63] Ramaiya v. Mottayya A.I.R. 1951 Mad. 954; Kisanji v. Lukshmi A.I.R. 1931 Bom. 286; Deivanai Achi v. Kasi A.I.R. 1957 Mad. 766.

[64] Section 25. It seems better than the Civil Code of Japan, 1946, Art. 891 (1) in that it applies to more classes of property, but less good in that it does not apply to those who attempt to murder. For a comparative study see Derrett, "The Slayer's Bounty," 1 Univ. Ceylon L.R. (1958) 27–41.

[65] See 49 Harv. L.R. (1936) 715–54; 39 A.L.R. 2d. 477–505; 37 Iowa L.R. (1952) 582–9; also Ashwood v. Paterson 49 S. 2d. 848 (1951) and Grose v. Holland 357 Mo. 834, 211 S.W. 2d. 464 (1948).

[66] Section 23.

tunity to buy him or her out, and provisions for pre-emption are laid down in the act.[67] It seems that a skillful heiress could realise more than the market value of her share if the property were much more valuable in its undivided state, and if she could play one of her co-heirs off against another, for the Act contemplates something very like an auction amongst them.

Miscellaneous Matters

The Act seeks to make the law "up to date," and, for example, in its abolition of the limited estate, its contempt for the joint family, and its abolition of the protective provisions of the law relating to "disqualified" persons, tends towards the Western as well as the Modern. The instance of the murderer's disqualification shows that attention to advances in academic work on technical succession problems was not entirely absent. Another instance is the *commorientes* rule, which, by a subtle change of wording, avoids an anomaly that appeared in England.[68] Yet here, too, the lack of concentration and research is revealed. The English *commorientes* rule is far from adequate, has been treated with disdain in its country of origin,[69] and should give place to a more complicated, but more logical rule.[70] The rule that (consanguine) half-blood must be postponed to full blood still attracts the unthinking: plainly no one loses if all collaterals, whether of full or half-blood, share equally, since the reciprocity of the rule avoids any apparent injustice.[71] Likewise, our Act disenables collaterals to take by representation *per stirpes:* the antique preference for degree, which survives from the Anglo-Hindu law, is out of tune with contemporary usage and perhaps with common sense—however meritorious the surviving brother's nearness may be, his predeceased brother's children's needs impress the community favorably and will generally have impressed the decedent himself.[72]

A most unfortunately missed opportunity is revealed in the treatment of the highly controversial topic of illegitimates. Parliament believed that it was enacting what had been consolidated by case-law previously, merely abolishing the well-known and valuable right of the illegitimate sons of the numerous caste known as Sudras by their kept concubines

[67] Section 22.

[68] Law of Property Act, 1925, section 184. *In re* Cohn [1945] Ch. 5; Hickman v. Peacey [1945] A.C. 304 (H.L.) The Indian authorities before 1956 were very feeble: Y. N. Kulkarni v. Laxmibai A.I.R. 1922 Bom. 347; Manorama v. Rama A.I.R. 1957 Mad. 269, 278.

[69] Intestates' Estates Act, 1952, section 1 (4).

[70] The United States Uniform Simultaneous Death Act: 38 Iowa L.R. (1953) 750–62. See also 30 Oregon L.R. (1951) 172–7; 16 Can. B.R. (1938) 43–51. A set of rules that may meet most requirements is suggested in 56 Bom. L. R. (J.) (1954) 106.

[71] See Atkinson in 20 Iowa L.R. (1935) 185, 197 f.

[72] The Indian Succession Act allows representation: section 47.

to take a half of a legitimate son's share, or in some circumstances all the estate. The abolition was intended to make the law more "up to date." Lengthy discussions in Parliament failed to establish the need for either the complete equating of illegitimates with legitimates (for which precedents are not wanting outside India) or the abolition of the distinction between the legitimate and illegitimate child of a woman (for which sufficient precedent existed in India)[73] whether in succession to the woman, or, a somewhat harder cause to argue, in succession to that woman's kindred. Yet the actual words of the provision[74] suggest that the latter result was achieved, besides other unexpected novelties which cannot be discussed here.

In conclusion, it may be suggested that this experiment in social legislation will serve in two ways as a preparation for the Indian Civil Code. The public's reactions to the Act and the most commonly utilized devices to evade or supplement its provisions, whether by wills or by settlements and contracts, may be watched and statistics may be compiled after a period; the expense, which was taken for granted in Britain when the various laws of succession were about to be overhauled,[75] would be amply justified. Secondly the anomalies and insufficiencies, practically and academically, may be scrutinized in the light of experience gathered from all parts of the world; for it is always easier to criticize an existing provision than one which is still inchoate, lying unborn between the committees which have been drafting and the legislators who have still to enact.

[73] "Inheritance by, from and through Illegitimates at Hindu Law," 57 Bom.L.R. (J.) (1955) 1–22, 25–39.

[74] Section 3(1)(j): "provided that illegitimate children shall be deemed to be related to their mother and to one another, and their legitimate descendants shall be deemed to be related to them and to one another; and any word expressing relationship or denoting a relative shall be construed accordingly."

[75] See Report of the Committee on the Law of Intestate Succession in Northern Ireland (1951), Cmnd. 308; Law of Succession in Scotland, Report of the Committee of Inquiry (1951), Cmnd. 8144; Report of the Committee on the Law of Intestate Succession (1951), Cmnd. 8310.

Comments

THE RIGHT TO CHOOSE A NAME

Is there a constitutional right to a free choice of a name?

In two recent cases,[1] decided simultaneously, the Argentine Supreme Court had occasion to pass upon this question.

By Executive Decree No. 11,609 of October 13, 1943,[2] confirmed by Law 13,030 of October 7, 1947,[3] registrars of civil status were prohibited from inscribing births of persons with first names not expressed in Spanish or not appearing in the calendar or among the names of the fathers of the Independence; consequently, only names would be admitted to registry that were either Spanish or had become hispanicized by usage or native Indian names that had been incorporated in the national idiom (arts. 1, 2). Names signifying ideological or political tendencies, ridiculous or extravagant names or those contrary to good morals were to be refused registry (art. 4), as well as those not corresponding to the sex of the person (art. 7). The use of surnames as first names was likewise prohibited (art. 5). Inscription in the civil registry is of paramount importance in most civil-law countries.

In the *Baez Castro* case, the father gave his newborn son his own first name "Zadit." In the *Moore* case, the father gave his child one of his own Christian names, "Kirk." In both instances, the registrar refused to inscribe the names and was upheld in the lower courts.

The Attorney General,[4] Sebastian Soler, a distinguished practitioner and jurist, argued that the law was unconstitutional under the spirit of the Constitution, as expressed especially in articles 19 and 33. The former, which has no parallel in the United States Constitution (the main source of the Argentine Constitution) provides that the private actions of men that in no way affect public order or morality, nor injure a third party, are reserved only to God and are exempt from the authority of the magistrates. Article 33 prescribes that the declarations, rights, and guaranties enumerated by the Constitution shall not be understood as a denial of other rights and guaranties not enumerated, but which arise from the principle of the sovereignty of the

[1] Baez Castro, Dec. 2, 1957; 239 Fallos de la Corte Suprema 299; Moore, Dec. 2, 1957; 239 Fallos 304.

[2] Decretos del Poder Ejecutivo 1943, t. 2, 301.

[3] Leyes y Decretos Nacionales 1947, t. 2, 486–487.

[4] Argentine procedure has long required the opinion of the Attorney General in all constitutional cases. This provision was not followed in the United States, until recently, and then only partially. 28 U.S.C., s. 2403, provides that in any action, etc., in a court of the United States where the constitutionality of an Act of Congress affecting the public interest is in question, the court shall certify such fact to the Attorney General and shall permit the United States to intervene. Apparently, the Attorney General may intervene only to support the constitutionality of the statute. Smolowe v. Delendo Corporation, 36 F. Supp. 790 (D.C.S.D. N.Y. 1940). In Argentina, the Attorney General, as in the instant cases, often argues against constitutionality.

people and of the republican form of government. The right to a free choice of a name, not violative of public policy or morality, argued the Attorney General, is an inherent natural right essential to liberty.

The Supreme Court declined to go as far as the Attorney General. It reserved the right to pass upon each case according to its individual merits as it came up. The name Zadit, though not hispanicized, is readily written and pronounced by Argentinos; it is neither ignominious nor immoral, and the father had a right to give his son the name which he himself bore—"an intimate sentiment of paternal love to perpetuate in the son the affection and memory of the father."

The decision was rendered by a vote of three to two. The majority opinion referred to the companion decision in the *Moore* case. Here the appellant argued that the registrar's refusal was based on the fact that the name Kirk was not in the calendar of saints and therefore constituted a violation of freedom of religion. This allegation the Court threw out; the refusal was based on the name not being hispanicized.[5] The Court refused to be drawn into the controversial question whether there is a property right in a name, a question raised by the appellant. But a parent has a legitimate interest in perpetuating a traditional family name. This worthy aspiration is entitled to be fully respected, especially in a country the consistent policy of which has been to attract immigration and to give foreigners all civil rights granted to citizens. The interest of the individual must be weighed with the interest of the state. Consequently, in all cases in which the name selected, although of foreign origin and not translatable into Spanish, can be easily written and pronounced, is not ridiculous nor has immoral connotations in Spanish, and is the name of one of the ancestors of the child, there is no constitutional justification for the restriction of individual liberty, no reasonable interest of the State being involved. The Court cites a prior decision (201 Fallos 406) interpreting certain articles of the Civil Code, articles 979 (2) and 999,[6] to the effect that the *prenomen* can be freely selected by the parents.

In both cases, the decisions below were reversed.

The dissenting judges affirm that there is no property right in a name as such (citing Planiol,[7] Planiol-Ripert[8] and Salvat[9]); accordingly, the appellant's recourse to article 14 of the Constitution guaranteeing the right of property is unfounded. A name is not an individual right; it is established as a police institution in the interest of society in general, not of the individual (citing Planiol[10]). In the Argentine law, there are no absolute rights—all are subject to regulation by the law as a necessity derived from men living together in society (172 Fallos 21). The choice of a name transcends individual interest; it is a matter of concern to society. There is nothing unreasonable about the statute and hence under well-established precedents of the court (cases cited) it should be upheld. Other cases are cited to the effect that the courts cannot pass upon the motives of the legislature involving

[5] The dissenting judge in the intermediate appellate court based his opinion in part on the view that there was an infringement of freedom of religion.

[6] Requiring public instruments to be in Spanish. Article 953 of the Civil Code, cited by the minority judges prohibits *inter alia*, jural acts of any kind contrary to good morals.

[7] Planiol, Traité Élémentaire de Droit Civil (6th ed.) I, No. 397.

[8] Planiol-Ripert, *op. cit.*, 114.

[9] Salvat, Tratado de Derecho Civil Argentino, Parte General I, No. 653.

[10] Planiol, *op. cit.*, note 7, No. 398.

political, not legal, questions, and as long as the motives are not manifestly arbitrary or unreasonable, the court has no power to declare unconstitutionality. It may be noted that the majority in the intermediate appellate court had sustained the constitutionality of the statute on the ground that the limitation it imposes is in furtherance of a laudable intent to maintain the integrity and purity of the Spanish language which constitutes an element that contributes to the creation of a sentiment of nationality, the unity and furtherance whereof are among the purposes recited in the preamble of the Constitution.[11]

(After correcting the proofs of this article, a later decision by the Argentine Supreme Court has come to my attention. In the matter of *King,* published in La Ley of October 6, 1959, the court upheld a refusal to register "Malcolm" as the first name of the appellant's child, such name not being traditional in his family. The court said its present decision is not in conflict with its prior decisions in the *Moore* and *Baez Castro* cases, but, as pointed out in a note to the decision, in the same issue of La Ley, by Güillermo A. Borda, it appears that the court has in effect reversed itself and that probably it will not in the future permit any foreign names. Borda upholds the full constitutionality of the legislation in question, supporting the view of the dissenting judges set forth in the text of this article.)

The Anglo-American law as to names is almost entirely based on inveterate deep-rooted usages and customs that have acquired the full force of law. It is this customary law that confers the surname of the father on the children and that permits the parents to give the child any Christian or first name they please. It may be even a single letter, either a vowel or consonant.[12] But the common law, contrary to European law, goes further in the matter of freedom of names. It is well settled at common law that, in the absence of fraud, a person may change his name at will without resort to legal proceedings, by merely adopting another name.[13] In jurisdictions where the change of name has been regulated by statute, it has been generally held that such legislation is merely permissive, in aid of the common law to facilitate evidence and furnish a record, and does not repeal or abrogate the common law.[14] In England, there seems to be some doubt whether a baptismal first name may be freely changed.[15]

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[11] This seems to me a farfetched interpretation of the preamble, which speaks only of "constituting a national union." The preamble copies in large part the United States preamble.

[12] 38 American Jurisprudence, Names 597, 598.

[13] 23 Halsbury's Laws of England (2 ed.—Hilsham) 555 *seq.* (under War emergency legislation, excepting aliens); 16 Halsbury's Statutes of England (2 ed. Burrows) 639 *seq.;* Petition of Snook, 2 Hilton (N.Y.) 566 (a learned disquisition by Judge Daly); Smith v. U.S. Casualty Co., 197 N.Y. 420 (1910); Merovelitz, petitioner, 320 Mass. 448 (1946); McAdam, Individual Corporate and Firm Names (1894) 6 *seq.;* 38 Am. Jur., 601 *seq.* 610; 65 C.J.S. Names, s. 9, p. 9 *seq.* Semble in Louisiana, there is no right to change the name except pursuant to the statute. Op. La. Atty. Gen. 1942, 963. In Pennsylvania, by statute it is unlawful to assume a different name unless the change is authorized by judicial proceedings. Purdon's Pa. Stat. Ann. Title 54 Names s. 5.

[14] Merovelitz, petitioner, *supra* n. 13; Smith v. U.S. Casualty Co., *supra* n. 13, at 429; 38 Am. Jur., 616 *seq.;* 65 C.J.S. 20; in re McUlta, 189 Fed. 250 (D.C.N.D. Pa. 1911).

[15] "If a man has become generally known by the name which he has assumed in

In England, the procedure for a change of name is either by private act of Parliament or royal license (both rarely resorted to) or by deed poll duly enrolled in the Supreme Court.[16] In the United States, the procedure for a change of name is by application to a court. The statutes vest a large discretion in the court.

The common law is in agreement with the Argentine judges that, apart from questions of unfair competition and use in business, there is no property right in a name.[17] The present-day French law, contrary to prior holdings, is in accord,[18] as is also the Swiss law.[19]

In contrast to the common law, a sixteenth century French ordinance (edict of Ambroise, 1555) prohibited a change of name, except by letters patent from the King.[20] A law of 6 Fructidor Year 11, still in force, prohibited the use of a surname or first name other than that recorded in the birth certificate,[21] but proceedings may be had for a legal change of name. In Switzerland, prior to the adoption of the Civil Code, change of name was permitted in most of the cantons, either by statute or by custom. And under the Code, the cantons are authorized to permit a change of name for good cause, but any third person injured by such change may attack it in court within one year from the date he learns of it.[22]

The Argentine statute, above cited, is not without precedent in French legislation. The law of 11 Germinal Year 11, still in force,[23] provides that the registrars of civil status can inscribe only such first names as are in use in the various calendars or are of historical persons (art. 1).[24] It also permits

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addition to, or in place of, his baptismal name, there is no doubt that the name so assumed is valid for purposes of legal identification." Halsbury's Laws, *op. cit.*, n. 13, 556. Contr: Halsbury's Statutes, *op. cit.*, n. 13, p. 639; Fox-Davies & Carlton-Britton, The Law concerning names and change of names (London, 1906) 4.

[16] Halsbury's Laws, *op. cit.*, n. 13, pp. 558–560, Fox-Davies, *op. cit.*, n. 15, at 85, contend that the deed poll, its registration and advertising are not sufficient, "the right to the new name still requires to be established by long custom and repute of other people."

[17] Du Boulay v. Du Boulay, 2 L.R.P.C. 430 (1869; 16 E.R. 638, S.C.) quoted with approval in Manz v. Philadelphia Brewing Co., 37 F. Supp. 79 (D.C.S.F. Pa. 1940); Fox-Davies, *op. cit.*, n. 15, p. 1; McAdam, *op. cit.*, n. 13, p. 12, quoting Ovid, "Birth and ancestry and that which we have not ourselves achieved, we can scarcely call our own"; 38 Am. Jur. 609.

[18] Planiol-Ripert, Traité Pratique, *op. cit.*, n. 8 No. 114, p. 140 *seq.*

[19] Osman, Le nom des personnes dans les codes civils suisse et turc (Liège 1934) 11–12, citing however, some authorities to the contrary.

[20] Arnold, "Personal Names," 15 Yale L.J. (1906) 227, 230; (1957) Dalloz, Jurisprudence 332, note.

[21] Dalloz, (Petit) Code Civil (1957) 56.

[22] Osman, *op. cit.*, n. 19 at 45.

[23] Dalloz, (Petit) Code Civil (1957) 56.

[24] This law repealed a prior decree of 16 Brumaire, Year 11, which, following the Roman law, permitted a free change of names; notice to the registrar required. Osman at 111. The rule as to first names, "a wise provision in the abstract is difficult to apply if there is a conflict between the father or other declarant and the official in charge. The registrars who engage their responsibility by an unjustified refusal, on the one hand, but know that tolerance exposes them to no sanction, generally accept any name that is given them." Planiol-Ripert, *op. cit.*, No. 126.

application to the Government for a change of name for good cause (art. 4 *seq.*). In France the request for a change of name must be published in the *Journal Officiel* and in a local newspaper; the opinion of the Council of State must be given—the change of name is not an absolute right, but a favor. Opposition may be made within a year.[25] Recent laws have facilitated the change of foreign names.

Two current cases illustrate the French practice and are mentioned here, one because of its human interest to enliven a dull article, the other to strike a contrast with a New York case.

Article 57 of the Civil Code, as amended by a law of November 12, 1955, permits a change by judgment of the Christian name or *prénom* on a showing of legitimate interest. Prior to 1955, the *prénom* was deemed immutable; the law of 11 Germinal comprised only change of surnames.[26] In the *Prudhomme* case,[27] the Court of Appeal of Paris refused the petitioner's application to change Rachel to Dominique, finding that no sufficient reason had been shown. The Court found no proof to sustain the petitioner's allegation that:

> "at the time of the declaration of her birth, her father having celebrated the happy event a little beyond reason, had made a mistake in the Christian name and had allowed the official of civil status to inscribe the child under a first name different from that he had really chosen."

In the case of *Lacotte v. The Public Ministry,*[28] the petitioner had duly changed in 1950 his original surname of Levy to Lacotte. He applied for a change of his first name, under the 1955 law. The Court of Appeal of Colmar ruled that a person who has obtained a change of his patronymic name, of an Israelite consonance, has a legitimate interest that none of his names shall reveal his Hebraic origin, and therefore authorized him to eliminate the name Isaac.

A New York court, on the other hand, in *Petition of Cohen,*[29] refused the young petitioner's request to change his name from Morris Cohen to Murray Kagan, Judge Ryan saying, *inter alia:*

> "To the age of the petitioner we may attribute his lack of knowledge of the many distinguished and successful Americans in the professions and in the banking and mercantile world who have proudly borne the name of Cohen . . . The name Cohen . . . comes down through the centuries signifying the reputed descendants of the priestly caste in ancient Israel . . . the priests of the temple in the Old Testament. In a sense the name constitutes a badge of noble heritage. Thus may the petitioner know that he bears a traditionally old and honored name, and this court will not aid him in his desire to forswear his original identity by assuming another and totally different one under the circumstances set forth in the petition."

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[25] Planiol-Ripert, *op. cit.*, No. 107, pp. 128, 129.

[26] Planiol-Ripert, *op. cit.*, No. 127.

[27] Cour d'Appel de Paris, October 12, 1957 (1957), Recueil Dalloz, Jurisprudence 720.

[28] Cour d'Appel de Colmar, February 13, 1957 (1957), Recueil Dalloz, Jurisprudence 331.

[29] 163 Misc. 795; 297 N.Y. Supp. 905 (City Ct. N.Y. 1936).

Some of the restrictions in the Argentine statute, such as the prohibition of ridiculous or extravagant names or those contrary to good morals, were recognized, it will have been noted, by the Supreme Court as constitutional. In Switzerland, there is no express legislative restriction, and the parents or others exercising the paternal power may in general freely choose the child's first name. Nevertheless, absolute liberty does not reign; it is tempered by good faith and by the theory of the abuse of rights; the name must not be one harmful to the future interest of the child.[30] In Spain, the civil registrar must refuse to permit extravagant or improper names.[31] Other instances could undoubtedly be adduced by further research.

Have we gone too far in freedom of choice of names for our children? Should we profit from these foreign examples and enact legislation that would prohibit giving children shameful or embarrassing names? One could sympathize with reasonable legislation that would control, in the interest of the child's future welfare, such instances of misplaced humor as prompted a Texan by the name of Hogg, later destined to rise to political eminence, to call one daughter Ima Hogg and another Ura Hogg. Legislation of this character, like the statutes regulating the use of fictitious or assumed names in business, undoubtedly would fall within the constitutional police power of the states. In the matter of the change of names of minors, a few of our statutes expressly recognize to the full the welfare of the child (Illinois, New York). In the case of *Application of Wing*,[32] the Court authorized the mother who had adopted the Muslim religion for herself and her eleven year old daughter, to change her own name, but refused the application to change the daughter's name from Cheryl Ann Wing to Hafsah Ashraf. Basing its decision on the Civil Rights Law, Section 63 of New York, which requires that the change will be approved only if "the interests of the infant will be substantially promoted by the change," the court said:

> "such change may have an adverse effect. The child has other family ties. She attends public school. She was born in this country and is a citizen thereof . . . (the mother) should not be permitted to adopt, with the Court's approval, a name for her infant daughter that will set her apart and seem strange and foreign to her schoolmates and others with whom she will come in contact as she grows up."

Why should not this underlying principle of the child's welfare be extended to the initial attribution of a name? On the other hand, one may well hesitate to recommend legislation that further curtails our diminishing liberties. Parents are inspired by love and affection and instances of abuse may well be so rare as not to justify the attention of the legislature.

PHANOR J. EDER*

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[30] Osman, *op. cit.*, n. 19, at 45.

[31] 38 Enciclopedia Espasa, *Nombre*, 1001.

[32] 4 Misc. 2d 840, 157 N.Y. Supp. 2d. 333 (1956). Leave to renew upon the child's attaining the age of sixteen was granted.

* Board of Editors.

DIVORCE IN GERMAN LAW

I.

As in all other continental European countries, the body of legal doctrine in Germany is based on the principle of codification. German civil law has been codified in the so-called *"Bürgerliches Gesetzbuch,"* the German Civil Code, the fourth book of which contains family law. Matrimonial law, including divorce law, had actually been separated and comprised in a special law by the National Socialists after Germany's annexation of the Austrian Republic in 1938. The matrimonial law of 1938 was pervaded by typical National Socialist thought. Persons of different blood, especially those of Jewish descent and so-called "Aryans" were not allowed to marry each other; sterility of either marriage partner was acknowledged as a ground for divorce.

The Allied Control Commission for Germany therefore thought it necessary in 1946 to provide for a reform of German matrimonial law.[1] The Control Commission's Law No. 16 is still of legal force in the German Federal Republic today. In cases of dispute respecting its interpretation, the original French, English, and Russian texts are authoritative.[2] In the Soviet Zone of Germany, this Control Commission Law is no longer in force. Matrimonial law has been newly established there according to the Communist conception of matrimony. But the Federal Republic's matrimonial law has been exclusively subject to German jurisdiction since the abrogation of the Occupation Statute.

II.

Private divorce, to the effect that the partners declare to a registrar their mutual consent to a divorce, does not exist in the Federal Republic. A divorce here can only be granted through a judicial decree of an ordinary civil court.[3]

According to Control Commission Law No. 16 there is no comprehensive clause for divorce, but the possible grounds for divorce are extensively enumerated in six paragraphs.[4] Two of these grounds are based on one partner's conduct, four of them may also obtain if neither of the partners is guilty. In addition to these there are a number of grounds for annulment of a marriage.[5] Grounds for annulment pertain to the time before the marriage is contracted (e.g., in the case of an error regarding the marriage ceremony, regarding the identity of the marital partner or his traits of

[1] On the other hand, it is somewhat remarkable that the German matrimonial law of 1938, after having been freed of National Socialist tendencies, is still in effect in Austria. According to press reports, however, a new matrimonial law is being prepared there which, in agreement with the Vatican, increases the difficulty of obtaining a divorce.

[2] Thus the unanimous opinion. *Cf.* Soergel, Kommentar zum Bürgerlichen Gesetzbuch, 8th Ed., 1955, p. F 123.

[3] Para. 41 of the Allied Control Commission Law, hereinafter referred to as the ACCL.

[4] Paras. 42 to 46, and 48 of the ACCL.

[5] Paras. 30 to 34 of ACCL.

character[6]). Grounds for divorce, on the other hand, are those which occur after the marriage. In Germany, mere *"separatio a toro et mensa,"* separation from bed and board, no longer exists, whereas it still does in Catholic countries such as Italy.

(1) The gravest ground for divorce is adultery committed by one of the partners.[7] Adultery is a so-called absolute ground for divorce, i.e., the other partner can petition for divorce even if conjugal community is not ruined otherwise. This ground for divorce is void only if the deceived partner pardons the adultery or does not consider it a disturbance,[8] i.e., if the adultery has been condoned or even demanded by the other partner. For, by his condonation the aggrieved partner in effect has waived his claim to a divorce. The German courts assume condonation if conjugal intercourse is continued. In this case it would be of no consequence if the injured marital partner declared that he had not condoned the adultery.[9] On the other hand, condonation is subject to the condition that the insulted partner had *full* knowledge of the violation of marriage duties. Should he have only partial knowledge of the transgression, he can only have forgiven partially and can still sue for a divorce on account of that which he subsequently learned.[10]

The question is still being disputed whether one partner can sue for a divorce on the grounds of adultery after deliberately having led the other partner into temptation in order to put him to the test and he did not resist the temptation. The German Courts have recently been inclined to deny a petition that is based on such an experiment.[11]

A marital partner who deliberately leads the other into temptation himself grossly violates his marriage duties.[12] An act of adultery committed by one spouse may not be used as a pretext for a divorce petition by the other spouse merely in order that the latter may secure his freedom to devote himself to a third party.[13]

Objectively, the offense of adultery consists in cohabitation with a third person of the opposite sex (*conjunctio membrorum*). Mere physical contact

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[6] Whether premarital sexual intercourse on the part of the wife falls under this can only be determined on the basis of the individual case. *Cf.* Reichsgericht decision recorded in the Juristische Wochenschrift, 1934, p. 3269. Without doubt this question has been subjected to increasingly more liberal treatment with the passage of time.

[7] Article 42 of the Codice Civile Italiano. Thus the prevailing opinion. *Cf.* Palandt, Kommentar zum Bürgerlichen Gesetzbuch, 18th Ed., p. 1942; Reichsgericht decision in 164 RGZ (Reichsgericht-Zivilsachen) 270; Bundesgerichtshof decision in 18 BGHZ, (Bundesgerichtshof-Zivilsachen) 195. A deviating view, inclining to the opinion that adultery also presupposes that the marital ties have been irreparably severed, has been expressed by Habscheid in Familienrechts-Zeitschrift, 1954, p. 7. The supreme court of the British Zone of Occupation has expressly left this question open; *cf.* 1 OGHBZ (Oberster Gerichtshof für die Britische Zone in Zivilsachen) 20.

[8] Paras. 42, section 2 and 49 of ACCL.

[9] Reichsgericht decision in 96 RGZ, p. 268. *Cf.* on the other hand, decision of the Kammergericht, Berlin, in Juristische Wochenschrift, 1938, p. 1261.

[10] Reichsgericht decision 143 RGZ, p. 306.

[11] In reference to the previous jurisprudence, *cf.* Warneyer, Die Rechtsprechung des Reichsgerichts, 1915, p. 55.

[12] *Cf.* Palandt, *loc. cit.*, p. 1944.

[13] Bundesgerichtshof decision in 5 BGHZ, p. 186.

is not sufficient.[14] The husband cannot commit adultery by homosexual intercourse, and the wife does not commit adultery by lesbic intercourse. Adultery must also be evidenced. Mere suspicion, even if based on reasonable grounds, is insufficient. For example, the fact that a husband had spent a vacation with another woman would constitute insufficient evidence of adultery, but not if she impersonated his wife in a hotel and lived with him in the same room.[15] In any case the confession of the respondent is accepted as sufficient evidence if the court does not question the confession.

Subjectively, it is necessary that the adulterer be aware of his committing adultery and have the intention of doing so. Hence, he must have known that he was married and that the other person with whom he had sexual intercourse was not his marital partner. This means, for example, that no adultery is committed if the adulterer on having been granted a divorce in a foreign country which, unknown to him, is not acknowledged in his own country, erroneously believed that he was no longer married.[16] No more has adultery been committed if on account of mental illness, insanity, or intoxication he mistook the other person for his marital partner or if, because of intoxication or other reasons for irresponsibility, lost control over his actions (did no longer realize the consequences of his actions).[17] Nor is adultery involved if the intercourse with a third person was involuntary, e.g., if rape was committed on the wife.[18] Under certain circumstances adultery may also be excused if it was committed under a strong psychological stress or for the purpose of preventing a severe impairment of health. Nevertheless, the violation of marital fidelity is so grave that a defense that one had only found accommodation on a cold night after consenting to adultery and would have caught a cold if one had spent the night without shelter would not be accepted as a sufficient excuse. Under normal circumstances such a defense may almost appear grotesque. But in Germany between 1945 and 1948, when a tremendous mass of refugees came pouring across the devastated country from the East, these problems were a tragic reality. Even an act of adultery committed to save one's family from severe economic misery must be rejected according to the law, however understandable it may be humanly speaking. To make allowance for the motives would according to the conception of the German courts lead to a devaluation of the absolute obligation of marital fidelity. However, the *"Bundesgerichtshof"* (Supreme Court) recognized as excusable the adultery of a woman who had an affair with a Russian official in Soviet-occupied East Prussia while her husband was in a prisoner of war camp. She could establish prima facie that she had only given herself up to the Russian to save her five children from starvation. In this case the Supreme Court recognized a true state of necessity.[19]

According to German law, adultery has still further consequences. If a divorce has been granted on the grounds of adultery the aggrieved marital

[14] Reichsgericht decision in Juristische Wochenschrift, 1901, p. 548.
[15] Reichsgericht decision 108 RGZ, p. 233.
[16] Decision of the Kammergericht, Berlin, in Deutsches Recht, 1939, p. 1015.
[17] *Cf.* Warneyer, Die Rechtsprechung des Reichsgerichts, 1913, p. 423; *id.*, 1915, p. 290.
[18] Decision of the Supreme Court of the British Zone of Occupation, 1 OGHBZ, p. 222.
[19] *Cf.* Juristen-Zeitung, 1951, p. 719.

partner may apply for the punishment of his former marital partner and of the third person with whom adultery was committed. Adultery is an offense as defined by the penal code and can be punished with imprisonment not exceeding 6 months.[20] In addition, the marital partner is not allowed to marry the person with whom he committed adultery after the divorce is granted. Exemption from this interdiction can, however, be granted.[21]

(2) The second ground for divorce, based on delinquent conduct, consists in grave failure in other respects of one of the spouses in his marriage duties, or in his grave disruption of conjugal life by disreputable and immoral conduct.[22] This ground for divorce contains a limited general clause for violations of marriage duties other than adultery. In Germany, the majority of divorces are granted on the basis of this provision. In all cases in which an act of adultery cannot be proved, or in which the aggrieved partner declines to make an accusation of adultery, one usually has recourse to this provision and grants a divorce on the grounds of some other serious marital delinquency. It is to be noted, however, that in distinction to adultery, the establishment of some other marital delinquency is in itself insufficient for a divorce. It must also be shown that the marriage is irreparably disrupted because of this delinquency.[23]

Marital delinquency consists in the violation by one of the marital partners of the obligations placed on him in the marriage. These obligations stem from the postulate of reciprocal love, respect, and fidelity.[24] Not every failing is sufficient for a divorce. A grave failing must be involved.[25] However, several lesser failings can amount to a grave failing. On the other hand, a serious failing due to extenuating circumstances such as nervousness, sickness, overwork can appear less serious. Here the individual case must be carefully evaluated, which demands extreme sensitivity of the judge. A generalization within the confines of this article could lead to erroneous impressions, hence only a selection of some important individual cases which have been judged serious offenses by German courts shall be cited here.

(a) Violation of marital fidelity, particularly if the marriage partner seriously exchanges affections with a third person, but also, if, for example, he replies to a marriage proposal or submits one to a newspaper for advertisement.[26] Here, serious lack of affection, quarrelsomeness, physical maltreatment, toleration of interference by relatives in marital affairs are included.[27] Moreover, protracted daily silence,[28] as well as

[20] Article 172 of the German Penal Code.
[21] Para. 6 of the ACCL.
[22] Para. 43 of the ACCL.
[23] *Cf.* Reichsgericht decision 164 RGZ, p. 324 as well as the decision of the Bundesgerichtshof cited by Lindmeier–Möhring, No. 6.
[24] *Cf.* Reichsgericht decision in Höchstrichterliche Rechtssprechung, 1933, p. 1624. In this is included the duty of preventing the spouse from committing suicide, *cf.* decision of the Bundesgerichtshof, in 2 BGHSt (Bundesgerichtshof-Strafsachen) 150.
[25] Reichsgericht decision, 160 RGZ, p. 112.
[26] Reichsgericht decision, in Leipziger Zeitschrift, 1930, p. 646.
[27] *Cf.* Warneyer, Die Rechtssprechung des Reichsgerichts, 1933, p. 10; Reichsgerichts decision, 124 RGZ, p. 54.
[28] Reichsgericht decision in Leipziger Zeitschrift, 1931, p. 768.

the revelation of marital intimacies come under this heading.[29] Defective trust, as evidenced by unfounded jealousy,[30] or if one of the spouses engages a detective to follow the other partner, are similar grounds.[31]

(b) The refusal to beget children. The refusal can be justified, however, if illness or extreme economic need exists. The usual dangers of childbirth must be assumed by the wife.[32] Effeminate behavior on the part of the husband can also constitute a ground for divorce for the wife.[33]

(c) Uncleanliness, neglect of the household, drunkenness, prodigality.[34] Gross perversities constitute a serious marital failure as well.[35] In addition a spouse is guilty of serious marital failing if he does not respect the political and religious convictions of his partner,[36] if he ridicules the other partner publicly, or belittles him before the children.[37]

(d) In addition to such grounds in which the marital failing is directed against the other partner, immoral or criminal behavior, as for example, homosexuality or abortion constitutes a serious marital failing as well.[38] Every other criminal act, such as murder, theft, etc., can justly cause the other spouse to seek a divorce.

A prerequisite here is also that the behavior of the one spouse has irreparably disrupted the marriage. Only if, in the opinion of the court, restitution of marital harmony is not to be expected, is it possible to grant a divorce for the grounds enumerated under (2). As in the case of adultery, the ground for divorce is inoperable if the serious marital failure is based on culpable behavior, viz., if the spouse is not accountable for his actions, or if one of the exonerating conditions cited under (1) applies to him, or if the other spouse has condoned his conduct.[39]

The aggrieved spouse can apply for a divorce only within a certain period of time. If he has not applied for a divorce within 6 months after becoming aware of the ground for divorce, his right to a divorce expires.[40] If more than 10 years have elapsed since the occurrence of the grave marital delinquency and the aggrieved spouse learns of it only after 10 years, he has no right

[29] *Cf.* Warneyer, Die Rechtsprechung des Reichsgerichts, 1926, p. 215.
[30] Decision of the Oberlandesgericht, Stuttgart, in Deutsche Rechtszeitschrift, 1949, p. 187.
[31] Reichsgericht decision in Das Recht, 1924, p. 1127.
[32] *Cf.* Soergel, *loc. cit.*, F 172.
[33] Decision of the Oberlandesgericht, Hamburg, in Hanseatische Rechts- und Gerichtszeitung, 1933, p. 140.
[34] Reichsgericht decision in Das Recht, 1920, p. 2872; Reichsgericht decision in Juristische Wochenschrift, 1936, p. 376; Reichsgericht decision in Das Recht, 1919, p. 1496.
[35] Reichsgericht decision in Juristische Wochenschrift, 1935, p. 2714.
[36] Decision of the Oberlandesgericht Schleswig, in Monatsschrift für Deutsches Recht, 1954, p. 417.
[37] Reichsgericht decision in Höchstrichterliche Rechtsprechung, 1928, p. 1428.
[38] *Ibid.*, 1928, p. 1708.
[39] *Cf.* in particular the decision of the Bayerisches Oberstes Landesgericht in Neue Juristische Wochenschrift, 1949 p. 221.
[40] Para. 50, section 1 of ACCL.

whatsoever to apply for a divorce because of the past grave marriage delinquency.[41]

(3) If no marital delinquency has occurred because the serious marital failing by one of the spouses was due to a mental disturbance, the other spouse can nevertheless apply for a divorce if the matrimonial ties have been irreparably disrupted by the delinquent conduct.[42]

Also, even in the absence of grave marital delinquency, there is ground for divorce if the other spouse is mentally ill and the sickness is of such an advanced degree that the mental community of the spouses has been irreparably disrupted.[43]

A spouse can also demand a divorce if the other spouse suffers from a serious communicable or revolting disease which cannot be cured in a reasonable period of time.[44] Under these are included, for example, facial cancer, syphilis, etc. Whether a sickness is repulsive or not is determined according to objective criteria; no consideration is taken of any particular sensitivities of a spouse.[45]

The last-mentioned grounds for divorce naturally are not frequently met with in practice. Of particular significance, however, is the following divorce ground, which similarly is one which can obtain even if no marital delinquency has been committed by one of the spouses.

If the marital ties have been irreparably disrupted, although neither of the spouses is guilty of a serious marital failing, a divorce can also be applied for, on condition, however, that the spouses have been separated for at least three years.[46] This regulation did not exist in German law in 1938. It is intended to give people who do not suffer from one of the sicknesses mentioned above or who are not guilty of any marital delinquency the possibility of obtaining a divorce. Even extremely ethical people, who would not commit adultery or any other serious marital delinquency can come to the realization that they are mismatched and do not live well with one another. One does not wish to force such people either to commit a serious marital offense and thus create a ground for divorce, or, if they do not want to do so, to remain espoused. But it is required of them that they consider a divorce very carefully and in great detail. Hence the divorce can be granted only if the spouses have been separated for 3 years. Occasional meetings of the spouses during these 3 years do not interrupt this required time. In such a divorce process, the court must be convinced that the marital ties have been irreparably severed. Otherwise a divorce cannot be granted. If the spouses have maintained a cordial correspondence with one another during these three years, the marriage nevertheless can have been irreparably disrupted.[47]

A divorce is often granted on this ground to avoid an accusation against the other marital partner, which might possibly be made. Many spouses do

[41] Para. 50, section 2 of ACCL.
[42] Para. 44, ACCL.
[43] Para. 45, ACCL.
[44] Para. 56, ACCL.
[45] *Cf.* Palandt, *loc. cit.*, p. 1952.
[46] Para. 48 of the ACCL.
[47] Decision of the Supreme Court of the British Zone of Occupation in Monatsschrift für Deutsches Recht, 1948, p. 471.

not wish to cast the character of the other spouse into disrepute despite seeking a divorce from him, or do not wish to discriminate against him because of the children.

(4) For all grounds for divorce mentioned under (3) a divorce cannot be granted if it is morally not justified.[48] The court must decide whether this is the case. The marriage of a spouse who is not guilty of any marital infraction may not be dissolved against his will if the divorce would injure him extraordinarily.[49] To be taken into consideration are the age of the spouse, the length of the marriage, and the interests of minor children. The marriage of a spouse who became mentally ill at an advanced age or contracted a communicable or revolting disease can not be dissolved. This mental anguish is to be spared him in his advanced age. It would not be morally justified, moreover, if a divorce was granted for a marriage in which one spouse suffers from a revolting disease if he contracted the disease from the other spouse, who had been cured in the meanwhile.[50]

If the spouses had been married for many years, and if the husband falls in love with a younger woman during his declining years, then only the wife has the right to apply for a divorce on the ground of a grave marital delinquency. The husband could not apply for a divorce if his marital ties have been irreparably disrupted, and if he has been separated from his wife for more than 3 years.[51] If a spouse is guilty of a serious marital delinquency, then the court need not enquire whether the divorce consequently applied for by the other spouse is morally justifiable or not. One who is guilty of adultery or some other serious marital failing cannot have recourse to the plea that the divorce would represent a particularly serious hardship. Another restriction, however, exists on the grounds on which he could reject the divorce application; he can object that the other spouse has not found the marital delinquency serious or has condoned it. If he can prove this, then the marriage cannot be dissolved.

III.

After the divorce has been granted, the wife usually retains the family name of the husband.[52] She has the choice, however, of reassuming her former family name.[53] If she is the guilty partner, the divorced husband can deny her the further use of his name.[54]

The guilty party (respondent) must provide for the support of the former spouse, insofar as the latter is unable to do so himself.[55] Thus, for example, a rich guilty wife must provide for the support of a sick husband incapable of supporting himself to the extent that he may maintain the same standard of living as that which he had while married. Of more practical significance,

[48] Paras. 47 and 48 F section 3 of ACCL.
[49] Reichsgericht decision in 160 RGZ, p. 239.
[50] *Cf.* Palandt, *loc. cit.*, p. 1953.
[51] Bundesgerichtshof decision in 8 BGHZ, p. 126; 18, *id.*, p. 18.
[52] Para. 54, ACCL.
[53] Para. 55, ACCL.
[54] Para. 56, ACCL.
[55] Para. 58, ACCL.

however, is the reverse case; a guilty husband must support the wife if, for example, because there are children, she cannot pursue an occupation and has no other financial resources.

As the final consequence of a divorce it must be mentioned in conclusion that a woman cannot remarry before 10 months have elapsed after the divorce has been granted:[56] This regulation is intended to prevent the birth of any children of the former husband in the new marriage. She does not have to observe this restriction, however, if she has borne a child before the 10 months have elapsed, or if she has a medical certification that she is not pregnant or if she is older than 45 years.[57]

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[56] Para 8, ACCL.
[57] *Cf.* Soergel, *loc. cit.*, F 130.
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THE EXTRATERRITORIAL EFFECT OF SOVIET CRIMINAL LAW AFTER THE REFORM OF 1958

On December 25, 1958, the Supreme Soviet adopted fourteen laws as a first step in the reform of criminal law to be made by the central government of the Soviet Union.[1] The rest of the reform is within the jurisdiction of the governments of the republics of which the Union consists. This is far from a full description of the involved process which the reform will still have to run, but at this point the future shape of soviet criminal legislation is already visible, and the legislation particularly affecting the problem at hand has already been enacted. It includes, in the first place, the Law on the General Principles of Criminal Legislation of the Soviet Union and of the Constituent Republics, and in the second, the Law on Anti-State Crimes, both of which belong to the jurisdiction of the federal government. Furthermore, although criminal legislation is within the jurisdiction of the legislatures of the individual republics, there is little likelihood that their criminal codes will differ from the pattern set by federal legislation or by the codes adopted by the most important member of the Union, the Russian Soviet Federal Socialist Republic (RSFSR), in anything but details justified by local conditions. Until now the 1926 Criminal Code of the RSFSR has provided the model followed without exception in the entire Union, so that it is possible to refer to it and to its specific provisions as representative of soviet criminal law in general.

From the most general point of view, there is a difference between the solutions adopted by the common-law countries and those of the civil-law world. Perhaps too much is made of these differences as both systems rest on the same basic principle that the rule of criminal law is restricted to the territory of a particular country, and only in exceptional cases reaches beyond the frontiers of a state. At the same time these differences lead to practical consequences, and at this juncture it is enough to state that, as soviet law obviously belongs to the civil-law world, the legislative techniques followed

[1] For a full report on the reform of criminal law and texts of the legislation enacted, see Volume VII of Highlights of Current Legislation and Activities in Mid-Europe (1959) Nos. 1-3.

by its members must provide a background for a comparison and analysis of soviet solutions.

In civil-law countries the question of criminal liability for crimes committed abroad is decided by the fundamental rules of extradition. Nationals of civil-law countries are punished for crimes committed abroad as such countries do not practice extradition of their own nationals. In a similar situation, a foreign national is extraditable to foreign courts. It follows therefore that as no country has a direct interest in the prosecution of crimes committed outside its territory the jurisdiction of the courts as regards its own nationals is subsidiary, which is apparent in the fact that a national is punished for a crime committed abroad if the *lex loci* classifies it as a crime, although only the national law applies.

There are important exceptions to this set of principles. In the first place, nationals and aliens will be prosecuted if their crimes committed abroad have affected the interests of the state or of a national, even if the law of the place where the crime committed did not define it as a criminal and punishable act (e.g., foreign currency regulations, espionage, bearing arms against one's own country, etc.).[2]

Prima facie the provisions of the new Law of December 25, 1958, on the General Principles of Criminal Legislation (Arts. 4–5) merely repeat with some modifications Articles 2–4 of the Code of 1926. The force of soviet criminal law and the jurisdiction of soviet courts in criminal matters covers the territory of the Soviet Union, irrespective of the nationality of the offender, and extend to crimes committed abroad only when the offender is a soviet national or a stateless person residing in the Soviet Union. As regards foreigners, soviet criminal law has no extraterritorial application except, adds the law of 1958, when international treaties provide for the punishment of foreign nationals for crimes committed abroad.

This somewhat conservative formulation is in fact far more extensive of the extraterritorial force of the soviet criminal statutes and the jurisdiction of soviet courts, than it prima facie appears.

In the first place, modern European codes provide for the punishment of only the more serious crimes committed abroad. This reservation is missing from the soviet criminal statutes.

This may be due to the fact that the soviet criminal codes and, in their wake, the law of 1958, do not distinguish between various categories of crimes. What is even more important, neither the older codes nor the new law contain the reservation that the power to prosecute for a crime committed abroad is not dependent upon the fact that a punishable act under the *lex fori* is also a crime under the *lex loci*.

Of even greater importance is the fact that the provisions of soviet substantive criminal law are drafted in a manner which indicates that little attention has been paid to the principles concerning the limits of responsibility defined in the law on the General Principles of Soviet Criminal Law, or in case of the older codes, to the provisions of the General Part which was

[2] *Cf.* Polish Criminal Code of 1932, Arts. 3–8. Italian Criminal Code of 1930, Arts. 4–10. The Yugoslav Criminal Code of 1928, Arts. 3–13. The Greek Criminal Code of 1950, Arts. 5–11. The Swiss Criminal Code of 1937, Arts. 3–8.

replaced by the new General Principles. Although the reform of criminal law is not completed, two laws containing the definitions of the most important crimes and valid for the entire territory of the Soviet Union have already been enacted. Under the 1958 Law on Crimes against the State, espionage against the soviet state, a crime which under soviet law may be perpetrated only by an alien, is punishable regardless of the place where it was committed. Under Article 59[8] of the RSFSR Code of 1926 and Article 24 of the Law on Anti-State Crimes, the counterfeiting of soviet currency is punishable regardless of the place where it is done or the nationality of the offender. The same applies to other definitions of crimes whenever the interests of the soviet state or of soviet citizens are involved.

The provision that "Aliens who commit crimes outside the confines of the USSR shall be responsible under soviet laws in cases provided for by international agreements" is also common with the general practice of many civil-law countries.

This somewhat laconic formulation covers an entire range of crimes commonly known as international crimes, which are considered to offend the interests of the entire civilized world. Numerous modern codes have incorporated the list of such crimes contained in the resolution of the first congress for the Unification of Criminal Law held in Warsaw in 1927, which included the following offenses: piracy, counterfeiting of money, slave trade, trade in women and children, terroristic activities involving the use of means capable of creating general danger, trade in narcotics and other dangerous drugs, propagation of obscene publications, and all other crimes to be determined in international treaties. Since the Congress was held, an entire range of crimes, listed in its resolution in addition to some others, have been declared international crimes in international treaties, and the Soviet Union is a party to most of these.[3] The only major exception seems to be the crime of terroristic activities, which the USSR as a revolutionary state has to regard in a somewhat different light than do the states of free societies.

While these various aspects of the extraterritorial effect of the soviet penal statutes are generally in line with the practice of other civil-law countries, the soviet jurists have added a new category of crimes constituting an attack against the general interests of the proletarian revolution. Article 58[1] having declared punishable as counterrevolutionary crimes all actions aiming at the overthrow, undermining, or weakening of the soviet government, or of the external security of the Soviet Union, or of the basic, economic, political, and national achievements of the proletarian revolution, stated further as follows:

> "In view of the international solidarity of all workers, these acts are also considered counterrevolutionary crimes when they are directed against any other state of workers, even though it is not a member of the Soviet Union."

Until quite recently this provision was of a somewhat theoretical interest, and only since a number of people's republics in Eastern Europe and Asia

[3] Sbornik deistvuiushchikh dogovorov soglashenii i konventsi zakliuchonnykh SSSR i innostrannymi gosudarstvami Vol. XVI (Collection of agreements, treaties and conventions in force concluded by the USSR with foreign states) lists a number of conventions of this type containing provisions on the prosecution of international crimes.

have come into existence has it acquired practical significance. Of far wider application was the provision of Article 58[4] which declared as punishable:

> "Assistance by any means whatsoever to that part of the international bourgeoisie, which refusing to recognize the equality of the communist system, a system which is destined to replace the capitalist order, struggles for its overthrow, and also to all social groups and organizations which have been formed under the influence of the bourgeoisie, or directly by it, in order to prosecute a policy hostile to the Soviet Union."

There are several elements in this definition. In the first place crimes defined under this article consist of actions directed toward reversing or obstructing the course of history which is leading the world towards the communist system. One of the specific manifestations of such action is participation in any way in policies hostile to the Soviet Union. All types of action having that character are punishable, and when Article 58[4] is translated into practical language its purpose is to combat all political activities, also in foreign countries, opposed to the program of the communist parties. A loose formulation of this article made of its provision a powerful instrument in suppressing political activities opposed to the communist line when the Soviet Union expanded its domination into the adjacent countries in the period of World War II.

Article 10 of the new law on Anti-State Crimes of December 25, 1958, which is the last provision in the chapter on Crimes Especially Dangerous to the State, which replaced the chapter on counterrevolutionary crimes in the Code of 1926, states that:

> "In view of the international solidarity of toilers, especially dangerous crimes against the State committed against any other state of toilers, shall be punished in accordance with Section 1 through 9 of the present law."

The same law has not included a provision similar to Article 58[4], and consequently, the scope of criminal responsibility for socialist international crimes has been considerably curtailed. It seems that criminal liability for anti-communist political activities in countries other than those with an established proletarian government, has been eliminated from soviet criminal law. It is too early, however, to reach a final conclusion. Soviet courts have not been noted for their strict interpretation of the criminal statutes.

The international penal law of the socialist order is only another version of the basic ideas on the general suppression of crimes in the interest of the entire human race, however, with an important twist in the concept of such crimes. Under the traditional criminal law attacks against the legal order calling for general repression, irrespective of the place where the crimes were committed, include only non-political crimes, and as a rule the political nature of an offense makes any crime punishable exclusively under a local legal order. In soviet law the opposite is true, and most of the crimes declared punishable under the law of December 25, 1958, are political in character.

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THE INDIAN LAW INSTITUTE

Last year Dr. A. T. Markose and Professor Lawrence F. Ebb reported to readers of the *Journal* on an important stage in the development of the new Indian Law Institute.[1]

It will be recalled that the Institute was organized as an autonomous center for activities to improve legal research and training and to promote reforms in the law and administration of justice.[2] The Indians who organized the Institute hoped that it would become a center of legal studies in which lawyers from all branches of the profession—judges, practitioners, Government legal officers, and educators—from all parts of India, could participate. The Institute is intended to provide resources and services that it would be difficult for individual university law colleges to duplicate at present—library materials, opportunities for programmed and individual research, foreign consultants, and facilities for meetings and seminars.

The Institute undertook, as its first major activity, a program of research in constitutional and administrative law. The conference in December 1957 on which Dr. Markose and Professor Ebb reported recommended five specific projects which were adopted as the initial research program: Judicial Review of Administrative Action; Delegated Legislation; Procedure in Administrative Adjudication; Disciplinary Proceedings in the Civil Service; and State Barriers to the Movement of Commodities and Persons in Interstate Commerce.[3] Soon thereafter another project, on Fundamental Rights under the Indian Constitution, was added.[4]

During 1958 the Institute took steps to carry out the research program and to plan additional activities within the wide purposes of its charter. In the spring and summer a small research staff was organized. Dr. K. M. Munshi, Executive Chairman of the Institute, visited the United States to talk with legal scholars, judges, and practitioners and observe the workings of professional and scholarly organizations. In August the staff moved to temporary quarters in the new Supreme Court Building, which had just been completed. There it has had the advantage of ready access to Court records, Court proceedings, recent decisions, and the Supreme Court library.

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[1] "Conference of the Indian Law Institute," 7 A.J.C.L., (Spring, 1958) 219–238.

[2] The Institute's objects, as stated in Article 3 of its memorandum of association, include the following: (a) to cultivate the science of law, and to promote advance studies and research in law and its administration; (b) to promote the reform of administration of justice and of law and its healthy development suitable to the social, economic and other needs of the people; (c) to promote the clarification, simplification and systematization of law; (d) to promote the improvement of legal education, and to impart instruction in law and allied fields; (e) to publish studies, treatises, books, periodicals, reports and other literature relating to law and allied fields; (f) to co-operate with other societies, institutions and organizations, national and international, in the pursuit of all or any of the above objects.

[3] For the proposed scope of these studies, see 7 A.J.C.L. (1958) 219, at 233–8.

[4] Part III of the Indian Constitution (Arts. 12–35) contains the provisions relating to Fundamental Rights, including Art. 32, which guarantees the right to move the Supreme Court for the enforcement of the Fundamental Rights and confers on the Court the power "to issue directions or orders or writs, including writs in the nature of" the prerogative writs, for enforcement of those rights. Art. 226 confers similar powers upon the High Courts of the States.

A period of intensive activity began late in the summer of 1958. By then most of the initial staff had been recruited and was at work. Dr. Munshi returned from his overseas trip. Robert M. Benjamin, Esq., of the New York Bar and Professor Nathaniel Nathanson of Northwestern University Law School arrived (for periods of seven weeks and four months respectively) to advise on the conduct of the research program and development of future plans. The writer of this note came to New Delhi for a period of about two years to assist in the initial phases of the new enterprise and to help arrange for visits by expert foreign consultants.

With the assistance of Mr. Benjamin and Professor Nathanson questionnaires and check-lists were drawn up to elicit information and guide the factual research, particularly in relation to administrative procedure. Dr. Munshi received from the appropriate Government quarters an indication of official willingness to assist and co-operate in the studies of administrative procedure. Procedures under the Companies Act, Industrial Disputes Act and various taxing acts, and procedures relating to disciplinary proceedings in the civil service, were given priority. In October appeared the first number of the Institute's Journal, edited by Dr. Markose. The Journal has since been published on a quarterly basis. Professor David P. Derham, of the Melbourne University Faculty of Law, arrived in December for three months to assist the Institute, primarily in the studies relating to interstate commerce.

All-India Lawyer's Conference

In March 1959 the Institute held its first meeting of the general membership and an "All-India Lawyer's Conference." The Conference, over which Dr. Munshi presided, was remarkably well-attended, considering that it was the first of its kind to be held in India. More than 200 lawyers took part, representatives of the Bench, Bar, and Law Faculties from all parts of India. At least fifteen University law colleges were represented.

The Conference undertook three main tasks:[5]

1. *Research Program.* Committees considered the work done under the research projects up to that time, reached some preliminary conclusions, and advised on the future conduct of the research. The preliminary reports from the staff were necessarily sketchy, since the staff had been at work a relatively short time. Nevertheless, there were some lively and helpful discussions in the committees. For example, in the Committee on Delegated Legislation (with Justice P. B. Mukharji of Calcutta as Chairman) the participants included the Speaker, Deputy Speaker, Secretary, and Joint Secretary of the Lok Sabha (lower house of the Parliament) and the discussion was based on a substantial interim report by the Chairman.

2. *Legal Education.* One objective of the Indian Law Institute set out in its memorandum of association is "to promote the improvement of legal education, and to impart instruction in law and allied fields." The Institute has no formal connection with the university law colleges in India. Five seats on the Governing Council, however, are reserved for law deans and from the outset it has been the hope and expectation of the founders that the

[5] For a fuller report on the Conference, see 1 Journal of the Indian Law Institute (J.I.L.I.) (April, 1959) 427–64.

Institute could offer opportunities for discussion groups and seminars concerned with legal education and provide resources for the development of new teaching materials and specialized training—opportunities and resources that individual law schools would find it hard to provide by themselves.

The first Institute activity directly concerned with problems of legal education in India was the preparation of a questionnaire designed to elicit information on the composition of law faculties and student bodies, curriculum, teaching methods, library resources, and the like—factual information of which little has been available in the past. On the basis of some replies to this questionnaire and of earlier inquiries into legal education former Justice R. P. Mookherjee of the Calcutta High Court (now Dean of the Law Faculty in the University of Calcutta) submitted a paper summarizing available information and opinions and raising problems for discussion at the Conference.

It so happened that shortly before the Conference the Law Commission's report and recommendations on Legal Education [6] became available to the public. It provided an additional basis for discussions at the Conference.

The Committee on Legal Education was the largest of the conference committees, and one of the liveliest. The law school representatives, of course, were particularly interested in discussing policies for general application in Indian legal education, relating to such matters as the duration of the Bachelor of Laws course, qualifications for admission to a law school, curriculum, composition of law faculties (whole-time or part-time), qualifications and pay for teachers, and teaching and examination methods.

The Committee frequently referred to the Law Commission report on Legal Education, and the final recommendations of the two are in most respects parallel.[7] One difference was that the Law Commission recommended two years of full-time instruction in law schools leading to a B.L. followed by a year of training in procedure and other aspects of practice through an apprenticeship system; the Conference Committee recommended that three years full-time be required for the B.L. including in the last year procedural subjects and some aspects of apprenticeship.

The Conference and Law Commission recommendations on legal education, if put into effect, would clearly bring about a great improvement in legal education. To carry them out, however, will require the solution of some stubborn problems concerning finance, training of teaching personnel, development of new teaching materials, pressures for large enrollments, and the like. Moreover, each law school and university is quite properly mindful of its own autonomy, and general recommendations can be of only limited help in dealing with the problems of individual institutions.

The Conference recognized that its discussion had been only one step on a long hard road, and requested the Institute to undertake further work on the matter. The Conference discussions and report gain particular importance from the fact that Mr. C. D. Deshmukh, Chairman of the University Grants Commission, participated in several of the sessions. According to the Com-

[6] "Reform of Judicial Administration," Fourteenth Report of the Law Commission of India (1958). Vol. I, Chap. 25.

[7] See 1 J.I.L.I. (1959) 459–63.

mittee's final report, he gave an assurance "that financial assistance for improving legal education will be forthcoming."

Several of the law school representatives called attention to the interests and plans of the recently formed Indian Law Teachers Association and undoubtedly the Institute, in whatever further action it undertakes, will want to offer its services and co-operation to the teachers' association and other groups concerned with legal education.

3. *Indian Bar Association.* The Committee to consider the desirability of forming an All-India Bar Association also attracted a large number of participants. The Committee (under the Chairmanship of Mr. M. C. Setalvad, Attorney-General of India) reported recommendations to form an Organizing Committee which, operating entirely independently of the Law Institute and financed by individual contributions, should draw up plans for an Indian Bar Association and stimulate interest among local groups of lawyers throughout India. The Attorney-General will serve as Chairman of the Organizing Committee.

Such an association would be quite distinct from the All-India Bar Council that has been discussed in India for several years. The Council, if created by Central legislation, would be responsible for formulating and administering standards of admission to practice and of professional conduct and for maintaining an India-wide roll of practitioners. The Association would be an unofficial professional organization to promote unity among lawyers in India, advance professional interests, promote public services such as legal aid, and advise official agencies on matters relating to the legal profession and the administration of justice.

Progress and Prospects

Research. Of the projects in the Institute's organized research program, the work has gone furthest on Delegated Legislation, Civil Service Disciplinary Proceedings, and Administrative Procedure (Companies Act, industrial disputes, and licensing under the Essential Commodities Act). Substantial reports under these heads may become available during the year 1959–60. Perhaps equally important is the individual research that has been carried out by visiting consultants and by the staff on subjects related to the organized program. The products have been published mainly as articles or notes in the Institute's Journal.

The visiting consultants in the current year will include Dean Carl B. Spaeth of Stanford University Law School, Professor Shelden Elliott of New York University Law School, and Professor Alan Gledhill of the School of Oriental and African Studies, University of London. All expect to be in India for periods of at least four months. In addition Professor Harrop Freeman of the Cornell Law School, who will be in India primarily for studies of his own, is spending two months with the Institute. Dean Spaeth expects to work particularly on problems of legal education, Professor Gledhill on the Fundamental Rights project, and Professors Elliott and Freeman on the projects in Administrative Law.

It has been generally recognized that research will likely be most effectively carried out and hold the most benefit for legal education in India if it is conducted by members of law faculties who have demonstrated an interest and competence in research.[8] A significant step toward placing the program under able scholarly direction was the appointment of Dr. A. T. Markose (LL.M., Harvard, and LL.D., Lucknow) to be Director of Research. More academic lawyers have recently been brought into the work of the Institute. Dr. M. P. Jain (S.J.D., Yale), Reader in the Delhi University Law Faculty, has come to the Institute for a year to work principally on a study of the regulation of business under the Essential Supplies (Emergency Powers) Act of 1946 and the Essential Commodities Act, 1955, including the procedures for licensing producers and traders.

Arrangements have been made for Dr. V. N. Shukla (Ph.D., London) of Lucknow University to supervise the continuing research on Delegated Legislation and for Professor C. H. Alexandrowicz of Madras University to supervise the work on Fundamental Rights. They will carry on the work mainly at their respective universities.

Journal. The first number of the Journal of the Indian Law Institute appeared in the autumn of 1958. It has since been published every quarter, under the editorship of Dr. Markose. When the Journal was first started it was recognized that, given the present state of legal research in India, it would be a challenging task to put out a publication of a high scholarly quality on a quarterly basis. On the basis of comments so far received from India and abroad, it appears that the challenge has been ably met.

Library. The Institute's library, though small by the standards of an American law school, is rapidly becoming a library for legal research in public law unrivalled in India, or in South and Southeast Asia. Initial acquisitions have been concentrated on standard reports and public-law materials from India, the Commonwealth, and the United States. Mr. John Merryman, Law Librarian at Stanford University, has assisted in the acquisition of a good working collection of American materials.

The current emphasis on public law does not mean that other fields of law will be excluded from the Institute's research and training program or library build-up.

A full-time librarian was appointed in the summer of 1959. Among his first tasks will be the compilation of a catalogue so that scholars in India and abroad will know what resources for research are available at the Institute.

Training Activities. In his opening remarks at the March conference, the

[8] Attorney-General Setalvad gave one statement of this view in his opening remarks to the Conference:

> "The nature of the work to which the Institute stands pledged is essentially work which needs undivided attention given by whole-time workers. Men of affairs and practicing lawyers can but lend a hand in guiding the activities of the Institute . . . Far more useful would be the larger association with it of the academic lawyer devoted to the study, development and teaching of law. I am conscious of the dearth of academic lawyers in our country, but that, in my view, is no reason for not making use of such as we have. The practicing lawyer and the man of affairs exercising a watchful eye over the finances and general progress of the work of the Institute should, I think, leave the actual working of it more and more to those devoted to the study of law as a science." 1 J.I.L.I. (1959) 431.

Executive Chairman said: "The next step will be, if further resources and competent personnel are forthcoming, to run specialized courses in one or the other branch of law at the Institute or at selected law centres, and to hold seminars or refresher courses for practising lawyers." It is too early to report what the first training activities of the kind suggested by Dr. Munshi may be. Informal discussions have focussed on the possibility of one or two seminars or short courses in a field of law (such as administrative law) that has not yet been taught in most university law colleges. A course designed primarily for teachers who expect to give instruction in that field would have the most direct impact on legal education. It seems probable, in any case, that any instructional activity will be at the post-B.L. level, where the Institute's program could best supplement and strengthen the regular courses of instruction in law schools.

Conclusion. The Indian Law Institute has been in formal existence less than three years, and its initial work program has been under way less than two. For an undertaking so novel and unfamiliar in India, it has made solid and encouraging progress. Dr. K. M. Munshi, the Executive Chairman, has brought energy, imagination, and qualities of leadership to his task of guiding the Institute through its formative years. In Dr. A. T. Markose the Institute has had one of the few proven research scholars in India to direct its program of research and publications. There are, as one would expect, continuing problems in organization and in planning and executing programs, but already there are solid grounds for believing that the Institute will make highly significant contributions to the improvement of legal research and training in India and related problems of educational and professional standards.

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Book Reviews

SCHLESINGER, RUDOLF B. *Comparative Law: Cases—Text—Materials.* Second Edition. Brooklyn: The Foundation Press, 1959; London: Stevens and Sons Ltd., 1959/60. Pp. xliv, 635.

This book appeared in its first edition in 1950 and was favorably received by the large majority of its reviewers. It can be expected that the new and revised edition of 1959 will meet with an even more laudatory reception.

A number of significant improvements have increased the value of the book as an effective teaching device. The first edition contained a large number of excerpts from the writings of comparative jurists which did not always convey the ideas or points sought to be brought out by Professor Schlesinger as effectively as might have been desired. Most of these excerpts were abandoned in the new edition and replaced by text materials written by the author himself. This new and original text, including text-notes and footnotes, constitutes about one-half of the book. The bulk of the remaining materials consists of decisions, mostly those of foreign courts, in a translation provided by the author.

Professor Schlesinger's new text materials will be of greatest assistance to the instructor teaching the course. They are carefully prepared, lucidly and interestingly written, and raise a large number of challenging questions for class discussion. The systematic exposition by the author of some of the basic features and characteristics of the Civil Law system will to a considerable extent relieve the instructor of the need for lecturing on matters of basic information.

Professor Schlesinger's general approach to the teaching of comparative law and his selection of the chief topics for discussion has, on the whole, remained unchanged. Like the first edition, the revised volume starts with an introductory chapter entitled "The Comparative Method—Its Purpose and Promise" which surveys the various ends that may be served by the comparison of legal systems in the domestic as well as the international field. The chapter has been rewritten and greatly improved. Cases decided by American courts have been added for the purpose of exemplifying the pragmatic value which some of our distinguished judges (like Chief Justice Vanderbilt and Judge Jerome Frank) have ascribed to comparative law in the solution of new and perplexing problems of American private and public law. The scope of inquiry has also been broadened by an extensive system of notes and questions.

The next chapter deals with the pleading and proof of foreign law in our courts and takes up, among others, such problems as the "fact" doctrine of foreign law and its effects, the proof of foreign law by official declarations and expert testimony, presumptions and burden of proof, and judicial notice of foreign law. The pitfalls facing counsel in the examination of a foreign law expert (caused in part by the difficulty of separating conflict of laws questions from foreign law questions proper) are well brought out by the reproduction

of the expert testimony before the Court of Appeals for the Second Circuit in the *Wood & Selick* case.

It might be asked whether such materials, which to some extent are treated in courses on Conflict of Laws or Evidence, properly belong to the domain of Comparative Law. Quite obviously, in so far as techniques for proving foreign law in the courts of other countries are compared with our own solutions, the question must be answered in the affirmative. This is done by Professor Schlesinger, but more space is accorded by him to our domestic principles and procedures on the subject. In the opinion of this reviewer, the inclusion of these materials can be justified, first, on the ground that the students interested in Comparative Law will recruit themselves to a considerable part from those who hope or expect to handle foreign law problems in their future practice and, secondly, on the ground that the treatment of pleading and proof of foreign law in other courses is usually rather cursory and elemental. Professor Schlesinger delves deeply into the policy rationales behind our solutions and also discusses some technical details of pleading foreign law which cannot be handled in a crowded course on Conflicts or Evidence. Teachers of comparative law with limited time at their disposal can easily omit or cut these materials.

The second main part of the book is entitled "Common Law and Civil Law—Comparison of Methods and Sources." The author starts out with an endeavor to clarify the distinction between a "Civil Law" and a "Common Law" jurisdiction. Whether the decision of the Philippine Supreme Court in the *Shoop* case, with its long-winded analysis of the meaning of "jurisprudence based on the principles of the English Common Law" is the best pedagogical vehicle for elucidating this distinction may be open to doubt. There follows, however, a textual treatment of the historical foundations of the two great legal systems (particularly the Civil Law system) which forms a new and most valuable feature of the book. No system of law can be understood without considering the historical forces by which it was shaped, although the author demonstrates convincingly that acquaintance with the more remote history of his legal system is not quite as indispensable for the student of the Civil Law as it is for the English and American lawyer. (Paradoxically enough, as the book points out, law students in Civil Law countries usually devote more time to the study of legal history than their opposite numbers in the Common Law world.) The encouraging conclusion reached by the author is that most of the significant differences between the Common Law and Civil Law systems have their roots in the conditions of bygone ages, and that no social, religious, or moral barriers create an unbridgeable gulf between the two orbits today.

A greatly enlarged and enriched note on the geographic expansion of Common Law and Civil Law follows the historical materials. The note accentuates the difficulty of attaching oversimplified and exclusive labels to many of the world's individual legal orders. A great deal of blending and amalgamation of Civil and Common Law ingredients has occurred in numerous countries of the world.

The next chapter of the book contains an exposition of the fundamental elements of Civil Law procedure. In the new edition, this subject is presented in the form of a comprehensive fictional dialogue taking place in an American

law office between two American attorneys specializing in international work and a famous professor of comparative law. The subjects discussed range from the selection of counsel and the fixing of lawyers' fees to the civil law notions of jurisdiction, the formulation of issues, and production of evidence in a civil law court, and the nature, effect, and finality of judgments. Appended is a brief discussion of the chief features of commercial litigation, arbitration, and criminal and administrative procedure in Civil Law countries. This method of imparting information on civil law procedure is attractive and lively, and the questions raised and points argued provide very fine starting points for class discussion of fundamental problems of procedural policy and court organization.

The chapter on Substantive Law, in its most important sections, deals with the force of precedents in a code system and the political, social, and moral elements underlying the principal Civil Law codes. Cases in the first area illustrate the use of judicial and non-judicial authorities by Civil Law courts, particularly German courts, Civil Law principles for interpreting code provisions, and the relationship between codified and customary law. The conclusion is suggested by the author that, while there are significant differences between the Common Law and the Civil Law judge's use of precedents, the attitudes of, at least, the United States courts and Continental European tribunals toward precedents are slowly converging. While the decisional materials utilized in this section are largely the same as in the first edition, the note material has been revised and augmented, so that a rounded picture of this crucial area of comparative jurisprudence is given. In the following section, the author proposes to show, by a number of examples, how political, social, and ethical value judgments of legislators tend to suffuse the provisions of codes, and how a change in political and social philosophy is often reflected in a new interpretation of code provisions. A large part of these materials is designed to focus attention on the manner in which the courts of Civil Law countries implement and concretize the "general clauses" of codes, e.g., statutory provisions invalidating agreements as being against *bonos mores,* or forbidding an abusive exercise of rights, or demanding *bona fides* in the fulfilment of obligations. Problems of this nature are not necessarily restricted to Civil Law jurisdictions, and they open up juridical perspectives of interest and importance to any student of the law.

While the chief emphasis of the book is on method, system, and sources of the Civil Law, the author has retained a chapter dealing with specific subjects. As in the first edition, these subjects are Agency, Corporations, and Conflict of Laws. These fields of the law are not, of course, treated in their entirety, but by means of selecting representative problems, some of which are likely to confront an American attorney engaged in an international practice. A further chapter on the "Special Hazards of Comparative Law" (such as the difficulties of language and translation, differences in classification, discrepancies between the printed word and the actual practice) is followed by a highly useful survey of English-language articles on comparative and foreign law which, together with an earlier section on the chief bibliographical aids available in the Civil Law system, facilitates the task of a practitioner or scholar who wishes to become acquainted with some branch or institution of a foreign legal order.

The appeal of the book is directed chiefly (though by no means exclusively) to the earthy and practically-oriented lawyer or prospective lawyer who is interested in acquiring some basic knowledge of the Civil Law system as a whole and who also wishes to obtain some insight into the procedural setting in which a foreign law problem is likely to be litigated in an American court. It has been objected that these educational aims are too modest and that the need today is for teaching comparative law "in the grand manner." A highly competent reviewer of Professor Schlesinger's first edition has asserted that "a course in comparative law to be really worthwhile should give the student, above all, an insight into the great historical, political, social, and economic forces which have shaped and still shape the laws of the western civilization and have molded and still mold their common and divergent characteristics. Thus, for instance, the problem of constitutionalism and the position of the individual vis-à-vis the government, the rise and functions of administrative law, the growth of, and fundamental issues in, modern labor law, and the tremendously interesting transformations of continental private law especially since the turn of the century should be at least spotlighted."[1] This reviewer is greatly in sympathy with this broader objective, but he is somewhat doubtful that it can be accomplished effectively within the framework of an introductory course in Comparative Law such as an American law school of average size would be willing to offer to its students. While it is possible to present a somewhat unified picture of the attitude a Civil Law court is likely to take toward the admission of evidence and the interrogation of witnesses at a trial, the construction of a code provision, or the use of a precedent, it would be very hazardous to offer reflections on the problems of constitutionalism, the growth and structure of administrative law, and the chief issues of modern labor law that would be equally applicable to West Germany, Spain, France, and Argentina. The problems in these areas of public law would appear to be so specialized that they could perhaps more appropriately be handled in a seminar.

It is, of course, possible to focus a course in Comparative Law on the thorough and detailed discussion of a few selected problems of private or public law in the light of the solution adopted by some particular country. Professor von Mehren's book on the Civil Law System is a first-rate casebook oriented toward this objective. But there is also a strong need for a casebook which, instead of concentrating chiefly on two or three areas of a particular positive foreign system, seeks to acquaint the student primarily with the comparative method as such and with those features and characteristics of the Civil Law system about which it is possible to make some generalizations. Those teachers who prefer this method of approach are provided by Professor Schlesinger with an excellent teaching tool.

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[1] Riesenfeld, Book Review, 3 J. Leg. Ed. 620, at 622 (1951). See also Friedmann, Book Review, 11 J. Leg. Ed. 122, at 123 (1958): "Is it not time that we grew up and had the courage to assert that the study of comparative law cannot be primarily justified in terms of the practitioners' needs?"

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SAVATIER, R. *Les métamorphoses économiques et sociales du droit privé d'aujourd'hui.* Seconde série: *L'universalisme renouvelé des disciplines juridiques.* Troisième série: *Approfondissement d'un droit renouvelé.* Paris: Librairie Dalloz, 1959. 2 vol. Pp. 340; 268.

These two volumes embody the reflections on law at the present time of one of the most powerful and original thinkers among lawyers: Dean René Savatier.

The author had previously published *Les métamorphoses économiques et sociales du droit privé d'aujourd'hui* (2d ed. 1952), a book of great interest in which he had outlined the evolution of French private law from the Code Napoleon to the present time, and the emergence of new legal institutions.

The purpose of the *Second* and *Third Series* of *Les métamorphoses* is somewhat different.

It is true that the first chapter is, again, an essay on "One hundred and fifty-five years of legal history: the fate of the French Civil Code." The essay shows the evolution of French law, both in its technique and in its substance, as a consequence of the evolution of the society and its prevailing philosophy (*cf.* Vera Bolgár, *The Concept of Public Welfare. An Historical-Comparative Essay,* 8 *Am. Journ. Comp. Law* 44 *et seq.,* esp. p. 60 *et seq.*). This remarkable chapter, together with Jean Dabin's *Individu et société: les transformations du Code Napoléon à nos jours,* to which Dean Savatier himself refers, should be read on both sides of the Ocean. The lawyer, although complaining of the daily bulk of new legislation, can hardly realize the distance covered from 1804, unless a guide helps him to understand the whole landscape and to follow the path in retrospect.

The following chapters, however, are an answer to a vague, but current and somewhat anxious interrogation on the place of private law in modern society and the directions in which its study should be led. Many lawyers felt (*cf.,* more broadly, Paul Purand, *La connaissance du phénomène juri-* the traditional concerns. What is the use of refining on small points of family law while neglecting the study of illegitimate unions, which are of increasing number and more or less recognized by social security rules? It could be more profitable to study the present legal status of illegitimate unions and their sociology, in order to elaborate a policy, the lack of which is presently bitterly felt (*cf.,* more broadly, Paul Durand, *La connaissance du phénomène juridique et les tâches de la doctrine moderne du droit privé,* in *Dalloz* 1956, chr. p. 73 *et seq.*). What is the use of refining on small points of property law while a number of the French are living a miserable life in slums? It could be more profitable to study, whether from the inside (*cf.* William Stringfellow, *Christianity, Poverty and the Practice of the Law,* in *Harvard Law School Bulletin,* June 1959, p. 4 *et seq.*), or at least by investigations, the reasons why people living in slums have not been able to settle in decent dwellings. What is the use of refining on small points of national law when a foreign law system might show a completely different approach to a problem and lead to a basic improvement of the law? Finally, one may ask what is the use of studying law at all and advocating a rule of law, when the lack of comprehension and tolerance has placed the world in a permanent danger of destruction which no law can cure and when, notwithstanding

the ethical principles which the West professes and all its economic and technical knowledge, it has not been able to cope effectively with poverty and starvation which grip between one half and two thirds of mankind (*cf.* André Tunc, *Sortir du néolitique,* in *Dalloz* 1957, chr. p. 71 *et seq.,* and *Les Facultés de droit et les grands problèmes du monde contemporain,* in *Dalloz* 1958, chr. p. 189 *et seq.*). Law is not the need of the world. The world is craving for justice, tolerance, charity. A law applied to an unjust situation and which does not tend to correct it can only perpetuate injustice and prepare uprisings. A law which is not a machinery for permitting all men to obtain a higher satisfaction of all their needs (including the spiritual and familial ones) is a useless law.

If Dean Savatier is not especially concerned with the world-wide dimensions of the present problems confronting lawyers, at least, on a national level, his *Métamorphoses, Second Series,* are a vigorous and persuasive plea for "the insertion of legal sciences in a renewed universalism." In the various chapters of the book, he underlines the influence of technological progress on law; he suggests researches on changes occurring in law as understood and applied, even when the statutory provisions remain the same; he advocates collaboration of lawyers and economists, lawyers and sociologists; he proceeds to researches of legal sociology on family and on professional activities; he observes the "confluence of two humanisms": medicine and law; finally, in the last three chapters of the book, he studies human blood, as seen by biologists and lawyers, the philosophy of the law governing information, and the place of history in the study of law.

In the *Third Series* of the *Métamorphoses,* Dean Savatier brings his ideas and methods into play and applies them to a "renewal of the law of persons" and "a renewal of the law of goods." His chapters on the legal promotion of the person, on health, on the new objects of rights, appear of special interest.

It is gratifying to follow the author in the new paths which he opens. In these two important and creative volumes, all chapters and sections may not appear to all of equal importance. But the reader will never fail to admire the author's culture, originality, and depth. What is more important, he may hardly fail, whatever may be his nationality, to find in these books new lights on the subjects in which he is interested. He will see in new perspectives the daily changes which occur in law. He may even take a new conception of his tasks as a lawyer in society and resume his work with more confidence.

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GREYFIÉ DE BELLECOMBE, L. *Les Conventions Collectives de Travail en Union Soviétique.* Paris/La Haye: Mouton & Co., 1958. Pp. 172.

There are some studies which are contributions if only for their choice of subject, and the book under discussion is one of them. This is not to say that it is devoid of other strong points, and we hasten to add that they are many: excellent organization, wealth of material, and an objective and precise treatment of the issues to mention only a few. But it must also be pointed out that the felicitous choice of the subject allows our author to review a whole

range of central problems of Soviet law. In the first place, the function and role of the collective agreement, and generally that of the trade-unions, are illustrative of the transformation which legal institutions known to the free world have undergone in socialist society. Furthermore, the author has had to review the entire mechanism of labor—industrial relations. Finally, the study of the relations between labor organizations and government agencies throw an intimate light on the fundamental principles and practices of Soviet constitutional law.

The over-all impression which the reader is apt to gain is that the function of collective agreement is in a state of flux. The theoretical formulations advanced from time to time, when a change of policy is indicated, are dictated by expediency and are hardly related to the tenets of Marxism. The policy of the government and of the trade-unions is subject to constant and rapid changes. Our author lists at least six periods in which the government policy regarding trade-unions and collective agreements has gone from one extreme to the other. Twice the trade-unions were practically suppressed as independent bodies, and their participation in determining labor-industry relations was reduced to a minimum. These periods were followed by periods of greater trade-union participation in shaping working conditions. Their activities were influenced successively by the centrifugal and centripetal tendencies in government operations. They were also affected by the recurrent struggle with the bureaucratization of the enormous governmental machinery which finally enveloped and transformed the character of the trade-unions themselves. In this presentation the delimitations between governmental and social functions disappear, as well as the distinctions between social organizations and governmental agencies. Both venture into fields of activity for which they were not designed; the trade-unions are charged with governmental functions, and governmental agencies assume the role of social organizers.

The most modern revival of trade-union activities, including collective agreements, is the result of the new reality which emerged from the catastrophe of World War II. Although our author gives little description of the conditions which made concessions to the democratic processes in the public life of Soviet Russia necessary, it is obvious that the new approach was partly dictated by the fact that the Soviet Union has become a model for socialist state-building for a number of nations which fell under its sphere of influence. The most recent development, which is perhaps the most significant for the future operation of the trade-unions, is the new policy adopted since the XX Party Congress, and the decentralization of the economic management of the Union.

Although our author's attention is quite correctly focussed primarily on an analysis of legal provisions, he makes it abundantly clear that the actual policies of the Party and the government were primarily responsible for the actual enforcement of the legal rule. One may perhaps wonder whether the exposé of this valuable study would not have profited if it had devoted more attention to the causes of the government policies, interpreting the legal rule in the light of the political goals desired. After all one thing which is quite certain is that in the Soviet reality the mere presence of the legal rule on the statute books is not enough to assure its enforcement.

In the final analysis, however, the legal nature of a collective agreement is not clear. Doctrinally, a collective agreement is an anachronism in a society which is predicated on the dogma that the nationalization and socialization of means of production have produced the miracle of a society without antagonistic interests. Legally and economically, collective agreements lose their meaning. "In the system of total planning the concept of the contract undergoes a transformation similar to that [undergone by] the concept of election or of voting in the system of dictatorship. Ancient forms, maintained only in appearance, are filled with the new content. The contract, conceived as an instrument of the plan, is no longer an instrument of the autonomous will of the parties and reflects that of the higher authority" (p. 12). In other words, institutions are preserved only in their outward form, and a contractual obligation is replaced by a camouflaged command, which pays little heed to the conventional function of the collective agreement. This remains true as long as the principle of the centralized administration of the national economy is fully realized. Our author notes that relaxation of the dictatorial regime brings about the revival of independent social functions and, whenever possible, a return to the traditional function of the labor organizations. In the course of the last few years (*cf.* p. 126) trade-unions have shown a tendency to break away from the principle that wages and scales of remuneration should be centrally decided, and have introduced some local changes in this respect. The trend toward decentralization may help these tendencies and restore some vitality to the institution of the collective agreement. In this trend, the author sees hope for the future of the collective agreement, which on the whole has not been conspicuously successful as a method for shaping labor-industrial relations in the Soviet Union.

The excellent organization of this book has already been mentioned. The only remark in this connection which the reviewer feels compelled to add is that the purpose of the introduction in the over-all pattern of the study is somewhat puzzling. In his appraisal of the function of the collective agreement, the author comes to a somewhat pessimistic conclusion. He feels that it has failed in the Soviet Union but holds out the hope that, in view of the fact that past practices have been subject to vigorous criticism since the XX Party Congress, the future may vindicate its role in the Soviet system. The introduction, however, which contains an exposé of the general developments of the institution in the Soviet system, gives a rather optimistic appraisal of its function in a socialist country. There is a contradiction between the conclusions of the introduction and those of the main body of the book which should be noted.

KAZIMIERZ GRZYBOWSKI*

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KÖRBER, W. *Atomenergieverwaltung im Ausland.* Studien zum Internationalen Wirtschaftsrecht und Atomenergierecht, Bd. 1. (Herausgegeben von Prof. Dr. G. Erler) Göttingen: Institut für Völkerrecht der Universität Göttingen, 1958. Pp. xii, 151.

LÜHE, E. *Atomenergierecht in Westeuropa, USA und Kanada.* Studien zum Internationalen Wirtschaftsrecht und Atomenergierecht, Bd. 2. Göttingen: Institut für Völkerrecht der Universität Göttingen, 1958. Pp. xxviii, 328.

MOSER, B. *Probleme und Grenzen der Atomgesetzgebung*. Wien: Springer Verlag, 1958. Pp. iv, 65.

Comparative Study of Atomic Legislation in Europe. Organisation for European Economic Cooperation, European Nuclear Agency. Paris: OEEC, 1959. Pp. 111.

The transnational effects of atomic energy had evoked a lively interest in the comparative studies of nuclear legislations[1] even before the full use of this new source of energy. Thus in 1955, the Institute for the Law of Nations at the University of Göttingen brought out the work by Dr. H. Kruse[2] on this subject. Now, once more, it has turned its attention to atomic international implications in its *Studies on International Economic*[3] *Law* (*Wirtschaftsrecht*) *and Atomic Energy*. This time the professed purpose of the first two volumes in this series is to evolve by means of a comparative analysis the common principles in the sphere of nuclear energy and examine whether it is not a particularly suitable subject for an international unification of laws. It should be, however, noticed what Professor G. Erler, Director of the Institute, points out in the Preface to the first volume, that in these Studies atomic energy laws are conceptually considered as being merely a particular field of the more inclusive International Economic Law. That evidently has an important bearing on the inquiry by Dr. W. Körber and Dr. E. Lühe, as will be indicated further below.

The subject of Dr. W. Körber's scrutiny is the administrative law and institutional framework for nuclear activities in the most advanced states. This means chiefly the United States, the United Kingdom, Canada, and France whose atomic institutions he examines with a view to their legal character, objectives, relations to other branches of the government, and international co-operation. Short comments on the situation in Australia, South Africa, Denmark, and some other countries, and charts of institutional hierarchy complete this interesting and richly documented work.

In his search for the common principles which may be discerned in the diversity of national atomic systems, Dr. Körber arrives at the following, briefly here summarized, conclusions. First, the development and control of atomic activities has been usually entrusted to a body not forming a part of the normal governmental machinery. Moreover, while such an agency is endowed with wide powers of diverse legal character, it preserves, in varying degrees in different national settings, its independence in relation to the government. Further, a collegiate basis for policy decisions is another firmly implanted principle, whereas the whole atomic institutional setup is characterized by a substantial participation of experts, and to some extent, business-like flexibility. Finally, though political control is preserved, it is somehow outside the regular Congressional or Parliamentary pattern.

[1] The first work of this kind has probably been prepared by 80th Cong., 2d Sess., Joint Committee on Atomic Energy, Comparison of Atomic Energy Legislation of the United States and certain Foreign Countries (1948).

[2] Kruse, H. Die Atomenergie im Völkerrecht und in den wichtigsten Landesrechten. 2 vols. Göttingen: Institut für Völkerrecht der Universität Göttingen (1955).

[3] The term economic law is used hereinafter in the sense of *ius* pertaining to economic affairs, and has nothing to do with economic laws as they are understood in economic theory.

Dr. Körber seems to suggest that the grounds for all this are mainly the technical complexity and economic impact of atomic energy, although he also alludes to political reasons, but somewhat in an offhand manner.

It is here, I believe, that the author of this otherwise competent study overstresses the technical and economic considerations, and neglects, to the detriment of his conclusions, the security implications of nuclear energy.

In the second volume Dr. E. Lühe examines legislations pertaining to nuclear energy in about twenty countries in addition to provisions in Western European co-operative and supranational nuclear organizations. This part, as much as the first volume, is well written and amply annotated. It encompasses an analysis of atomic enactments relevant to prospecting, mining, production, and ownership of nuclear materials, health and security protections, patents, liability, and international co-operation. In conclusion, the author scrutinizes specific issues in the field of the unification of atomic laws.

It is beyond the scope of this review to examine in detail all the conceptions under which the unification problems are raised by Dr. Lühe. Yet, it is surprising to find that the author, in spite of his earlier pronouncements on the particular necessity of the international unification of atomic laws, considers merely health protection, liability, and with some qualifications, patent matters, as being suitable for unification. This is probably due to Dr. Lühe's obvious preference for a unification—more appropriately to be called harmonization—such as does not infringe upon national sovereignty. That is also evident from his advocacy of the harmonization of nuclear laws as proposed within the OEEC, rather than of similar but supranational endeavors within Euratom. Moreover, the problem of judicial decisions in an *ad hoc* and static harmonization escapes the author's attention altogether.

Whether harmonization of the type envisaged by Dr. Lühe would realize the most important international objectives in the field of atomic energy is questionable. After all, atomic laws are policy-oriented law *par excellence,* and given the transnational repercussion of the use of atomic energy, it seems obvious that no significant unification of laws would materialize unless there is a change in the public policy of a rigid adherence to the tenets of sovereignty. The necessity to transcend the narrow territorial limits of national states in the unification of laws has been stressed by many authors, as for instance, professors H. E. Yntema, R. David, H. C. Aubin[4] to name only a few. And it is particularly needed in nuclear laws, where the unification cannot aim merely at the certainty of business transactions, but must have for the purpose a formulation of an international policy which shall have to affect national sovereignty if the dangers to human society emanating from the unlimited national application of nuclear energy are to be evaded.

This point of international security is well underscored by Dr. Moser in his book on the problems of atomic legislation. In an effort to propose the most suitable provisions for the new Austrian atomic nuclear law, Dr. Moser reviews the principles underlying atomic legislation in other countries. The major part of his work is occupied with an analysis of the substantive and adjective aspects of third party liability, in which he recommends to Austrian

[4] *Cf.* Hessel E. Yntema, Comparative Research and Unification of Law, 41 Mich. L. R. (1942), 261–268; or David's and Aubin's articles in Konrad Zweigert's Europäische Zusammenarbeit im Rechtswesen, Tübingen (1954), 1–17, and 45–78.

lawmakers, in accordance with the changing pattern on the Continent, to depart from the currently applicable subjective culpability for a principle of causal relationship. Other interesting notes concern atomic ramifications in such fields as penal, administrative, constitutional, and international law. The book includes a considerable bibliography.

The recent OEEC study of atomic legislations prepared by Mr. K. Wolff and Mr. F. Schmidt from the Legal Office of the European Nuclear Agency covers the same OEEC Member States as are included in Dr. Lühe's, and partly also Dr. Körber's, work. But in contrast to the approach of those two authors, the OEEC comparison of the atomic legislations is confined to factual synopsis of the legislative provisions and institutional patterns in individual lands.

The whole study is divided into twelve subject headings followed throughout each chapter, and including, besides a succinct characterization of the legal situation in the field of atomic energy, citations of the authoritative sources. In that respect, a most useful device has been provided at the end of each chapter in the form of a systematic table of laws and regulations relevant to atomic energy in each European country in question.

All considered, the OEEC study is a well-arranged publication which offers an up-to-date and expeditious orientation in the atomic legislative arrangements in Western Europe. It definitely represents a valuable contribution of much practical value.

JAROSLAV G. POLACH*

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VERDROSS, A. *Abendländische Rechtsphilosophie. Ihre Grundlagen und Hauptprobleme in geschichtlicher Schau.* Rechts- und Staatswissenschaften, Band 16. Wien: Springer Verlag, 1958. Pp. x, 270.

The author of this book, rich in content yet written in a happy, engaging style, acquired world fame as an outstanding authority on international law. Still, in the inspiring atmosphere of the Vienna Circle, which gathered in the interwar years around Kelsen, whose outstanding followers were Merkl and Verdross, he cultivated philosophy of law as well, lectured on it in 1924–1937, and again from 1945 to the present. Out of these lectures grew the present book with the result that while Verdross strongly deviated from Kelsen in adopting an ontological natural law doctrine, he still is able to reconcile it with the *hypothetical legal positivism* of his teacher and friend.

As a history of doctrines, the book is characterized by strong emphasis on the "forked order of the universe" as found in Hesiod, and on the ontological-teleological natural law as found in Plato and Aristotle. While any kind of monism is frowned upon, Plato is still preferred to Aristotle, whose 'immanence' of ideas is held to be less logically consequent than Platonic 'transcendence.' In comparison, the rest of the ancients, especially the cosmic monists, Sophists and Skeptics, and the Stoa are cursorily treated and less appreciated, with the exception of Heraclitus who is re-interpreted as teaching a hidden harmony behind the visible strife and eternal flux.

The additions contributed to antique ideas on law by the Christian Era are brought out admirably. Patristic doctrines, Augustine, and Thomas are

thoroughly treated and in many respects illuminated. Yet nominalism and rationalism, as well as the Reformation, are hastily leafed through, as it were, in order to enlarge instead upon Victoria and the 'crowning' Spanish legal philosophy of Suarez. Again, the "naturalistic natural law doctrine" of Hobbes, Spinoza, Locke, Thomasius, Rousseau, and Bentham, as well as the "rationalistic natural law doctrine" of Pufendorf and Wolff are frowned upon. Kant is thoroughly treated and somewhat re-interpreted, especially with the end in mind that the gap between Is and Ought may be conveniently bridged. In the same sense, previously, the *chorismos* to which Aristotle took exception as against Plato, had been interpreted away.

To understand his preference for ontological natural law over both individualistic—naturalistic and rationalistic—natural law and legal positivism, Verdross' attitude towards what he calls the difference between *Seinsphilosophie* and *Ichphilosophie* must be considered.

He objects to the replacement by Descartes and Kant of *Seinsphilosophie* by *Bewusstseinsphilosophie*. They have replaced the trustful reliance on the objective world by its construction out of the mere unaided reflexion of reason (99). And to Bacon's principle: *vere scire est per causas scire,* Verdross objects that this reduction of everything which transcends the senses to mere appearance (*idol*), though substantially extending our *knowledge* of nature, nevertheless has entailed a gradual shrinkage of our *conscience* (98). The question whether this is a sound view may serve in many ways as the crossroad where minds get divided.

Where Verdross' thought exhibits some inconsequence is in his earlier criticism of Greek cosmic theories of law, which certainly were a kind of *Seinsphilosophie* if ever there was such a thing. Yet he objects to their *monism,* while castigating also, beginning with the Sophists, the *separation* of ethics from the objective *cosmic* order, the disappearance of belief in an objective *legal* order, and the ensuing emphasis on *Man,* the re-interpretation of nature (*physis*) as something *subjective* and human (15). And yet he admits with the Sophists that "natural law is dependent on the essence of Man," and concludes that "anthropology is the foundation of natural law doctrine" (226).

These apparent inconsequences are, nevertheless, the best evidence for the view that Verdross, though insisting on ontological natural law and theocentric natural law doctrine, is more concerned with reconciling them with legal empiricism. This view is supported also by his reduction of primary natural law to very few and broadminded principles, which must be made more particular by positive law anyway, so that they look harmless, indeed. But in case these self-explanatory principles are violated in a serious way, not only a right but even a duty of resistance is vindicated.

In the present trends, return to ontology, teleology, metaphysics, axiology, neo-scholasticism is represented as the chief characteristic. In the last chapter, the end results are summed up and critically appraised. The chief points are indirect and direct knowledge of values, the anthropological interpretation of natural law, the distinction of primary and secondary natural law, human rights, and the precise formulation of the relationship between morality and law, and between natural law doctrine and legal positivism.

The outstanding points in the theoretical—as distinguished from the historical—argument throughout the book are, *first,* the Is and Ought relationship and, *second,* the paucity of primary natural law principles, their formulation, and distinction from morality.

As to the *first,* Verdross mentions that Lactantius objected to the Stoic rule *"naturam sequere"* since nature includes bad inclinations as well, and thus cannot be the fountainhead of natural law. Only the original, uncorrupted nature before the Fall may serve as such fountainhead (59). With Plato it is the *idea,* with Aristotle the *eidetic nature,* the *entelechy,* which alone permits the derivation of natural law, both ontological and teleological. Verdross correctly concludes that Is and Ought are not entirely separated (40). Thomas, following Aristotle rather than Plato, already proclaims: *bonum et ens convertuntur.* Verdross now admits: the Good has no independent existence either, but depends on the Is. The Ought, accordingly, is no independent category (78). Yet as against existentialism, he asks: how could directives arise from any impersonal Is? And he concludes: all attempts are doomed to failure which try to understand law as a mere Is (218). And yet he approves also of Gutwenger's view who—together with Reininger and Krafft—denies any independent realm of values. There are no values in themselves, since every value is a relation to somebody or something. Values are derived only from ends at which an effort is aimed. Gutwenger defines value, accordingly, as a cause that brings about perfection (196).

There is some hesitation as regards the status of Ought. Ontological foundation of the Ought means to Verdross that it can be derived from an Is only that is both inherently good and almighty: God. This is why Verdross says in the Preface that theological problems must be considered as well. Yet he believes also that natural law may be not only theocentric, but anthropocentric as well. Even those who believe that metaphysical problems cannot be solved by science and must be handed over to everyman's belief, may accept natural law as the lower level of the moral world order. If this be true, natural law, it is submitted, is reduced to what it is within the province of science: the laws of natural science in teleological formulation, the same as medicine is but utilization of such laws for human ends. This is enough indeed. As to the theological support, we may admit with Verdross that the knowledge of the moral world order is difficult and in need of revelation in order to discover the entire moral law easily, with perfect certainty, and without any error (257).

The *second* outstanding point in Verdross' argument is the precise relationship of natural law, morality, and positive law. The fundamental admission, as to this problem, is that whenever a natural lawyer speaks of the binding character of law, he can mean only its *moral* binding force (246). This makes the solution easy, indeed, especially if the positivist, on the other hand, means by the same term the *effective* enforcement of law only. Verdross is able to draw a clear line of demarcation between law and morality: law is distinguished by granting legal *rights* (which are never granted by morality *strictu senso*). But he seems to relapse into error by adding that these rights are secured by the *duty* of all others to respect them. Surely he is right in emphasizing that there are no mere rights without correlative obligations. But if the rights are not moral, but distinctly legal, then obligation has also a legal sense, distinct from mere moral duty. Indeed, Verdross quotes Auer

and Marcic who reject the view that law is any part of ethics (249–250). Both feel that law is more primitive and by this token more unconditional, closer to what is, and therefore situated before ethics (251). Law is indeed somehow bracketed by morality, but only in the sense in which George Cohn says that every legal decision entails lifelong moral responsibility which cannot be gotten rid of. Yet Cohn is rejected by Verdross, rightly so it is believed, because he washes away law into morality (220).

Verdross formulates three basic principles of natural law: to respect other persons and their rights; to obey public authorities and thus serve the community; and for authorities to do everything in order to promote the common good (232). These are very general and elastic principles. Even so the duty of obedience seems either to duplicate the duty to respect other persons and rights, or else possibly to interfere with and hurt the first principle. The whole concept of the common good, introduced to explain social as well as individual rights, suffers from ambiguity. It smacks of collectivism, even though Verdross endeavors to free it from that flavor.

But whatever may be their formulation, such extremely general and elastic principles undoubtedly facilitate the reconciliation of positive with natural law. At whose expense, is a different matter. Kunz may then correctly say: there is natural law, only it is not law but morality. And Messner may say: almost everything must happen through the human legislation (212). On the other hand, it is refreshing to know that some recent authors, such as the Catholic clergymen Funk and Fuchs, claim that natural law regulates particular cases and situations as well. The nature of man includes not only immutable elements, but historically changing ones as well. Natural law, therefore, must be stronger than history, and explanatory of history. It must permit a plurality of forms of *Ethos* within the wide framework of first principles (212). This sounds like the song of the future, more akin to what I tried to say by the law field analogy,[1] and also to what was needed to offer resistance and bring forth the shining examples—from Magna Carta to Declaration of Independence, from Swiss to American Constitution—of natural law and human rights successfully translated into effective law in the course of time.

But all these interrelationships are made apparent only thanks to this lucid book. It makes also so relevant to the history of legal ideas not only the contribution of Christendom as such, but more particularly that of Protestantism with its view of *corrupted* human nature. This entails *inability* to recognize natural law, whereas if human nature were merely *wounded* as a consequence of the Fall, it still may be able, though to a *lessened* degree, to recognize natural law. These are two versions of Christian faith and, indeed, of Western civilization. Neither of them is less Western on account of its recognition, or non-recognition, of natural law. The book is a gold mine of such and similar significant information.

BARNA HORVATH*

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[1] Field Law and Law Field, 8 Österr. Zeitschrift für öffentliches Recht (1957) 44–81. *Cf.:* Lahtinen, Zu Barna Horvath, Field Law and Law Field; Haesaert, La réalité physique selon C. Maxwell et la Théorie du Droit; Dourado de Gusmão, Norme, Fait et Droit; Tammelo, On the logical structure of the Law Field, 45 Archiv für Rechts- und Sozialphilosophie 1959, 81–101.

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Book Notices

MOLENAAR, A. N. *Arbeidsrecht.* Eerste deel: *Algemeen Gedeelte;* Tweede deel: A: *Het geldende recht;* B: *Het geldende recht.* 3 vols. Zwolle: W. E. J. Tjeenk Willink, 1953, 1957, 1958. Pp. xii, 925; xvi, 1174; xvi, 2277.

During the last world war Professor Molenaar was forced to hide from the enemy. Being an outstanding politician, he had repeatedly voiced his unfavorable opinion about Nazism and was therefore one of the Nazi targets when they invaded the Netherlands in the summer of 1940. Doomed to unemployment in his hiding-place he decided to use his incredible energy to write a comprehensive study of Dutch labor law, the field of which he was a teacher at the University of Leyden.

"Arbeidsrecht" is the complex of rules and regulations, written and unwritten, which deal with all aspects of labor regulations. It covers subjects such as: social security, wages and salaries, labor unions and collective bargaining, workers' participation in management, workers' education, etc. No part of law is more subject to changes, more responsive to political subjectivity, more complicated in its administrative set-up.

After resuming full responsibilities as politician and teacher, he became a member of the Dutch Senate in 1946, Professor Molenaar continued to devote all his spare time to his book. The result is three volumes, each over a thousand pages, covering every aspect, every detail of Dutch labor law.

The first volume appeared in 1953. It gives an analysis and colorful description of the historical background of our present legal system with respect to labor and our trends of thinking in this field. Special emphasis is given to the leading ideas, at a given time, the realization of these ideas, and the influence of political power relations. The subject of a chapter of the book is the International Labor Organization, its development, and achievements.

The other two volumes give a detailed description and evaluation of the structure of laws and regulations which form the present *"arbeidsrecht"* in the Netherlands.

Socialism and Catholicism are the two power-blocs in the Dutch political field. The law of labor, as it has developed in the Netherlands, shows clearly the influences from these quarters. One of the most interesting subjects is the so-called PBO, the *Publiekrechtelijke Bedrijfsorganisatie.* The author devoted one chapter to this organization of industry, an idea originating in Catholic and orthodox Protestant theories about corporatism, heavily influenced by socialist thinking in terms of state power in industry. Industry is grouped either horizontally—i.e., the same kind of factories—in so-called "industry boards," or vertically—i.e., from the basic industry up to the finished product—in "commodity boards." These boards are points of contact between labor and management on industry-wide issues. The whole structure is headed by a so-called Social Economic Council. Similarly to the other chapters of the book, this subject is described, and critically evaluated, with respect to its assumptions, form, application in practice, and prospects for the future.

Collective bargaining in the Netherlands is regulated in several laws.

Not only is there a law on collective bargaining dealing with the conditions, freedoms, and restrictions of the parties, etc., but there is a special act on the power of the government to extend a collective agreement to the whole industry and to *dissolve* a contract to which both parties have agreed, given certain circumstances.

These are two illustrations of the material to be found in Professor Molenaar's book. On every subject the existing conventions of the International Labor Organization are mentioned and reasons for ratification or non-ratification by the Netherlands are given.

Professor Molenaar was a member of the Liberal Party (VVD), a party about midway on the ideological scale between right and left; too left for the conservatives, too right for the socialists. He has written his book from this definite political outlook. He did not pretend to write an "objective" study. He has defended his own ideas and has made suggestions and critical remarks on the system where he saw fault. On the other hand, he has given due credit to all who have contributed to the Dutch *"arbeidsrecht,"* has analyzed their intentions, background, and political integrity.

The book is written in a fluent style; however, the handling of the language does not always match the importance of the contents. Occasionally "popular" expressions are used which do not live up to the weight of the study. Altogether, this book, in my opinion, deserves attention in the first place for its intelligent political analysis. In addition, it has the invaluable merit of being the first *comprehensive* study of Dutch labor law, a source of exact and detailed information.

Professor Molenaar died suddenly last year, soon after the last volume was published and his work of fifteen years had been completed. It is an honor to have received the opportunity to write the review of his book, which I saw growing and developing as one of his students and assistants.

ELISABETH M. A. VAN DOORNE

SPEISER, STUART M. *Preparation Manual for Aviation Negligence Cases.* New York: Federal Legal Publications, Inc., 1958. Pp. 1001.

This manual is not a treatise on the substantive law of aviation negligence (promised by the author for the near future), but rather a collection of practical reference materials thought to be useful to attorneys in this unfathomable field of litigation, "a compendium of regulations, practices and sources of evidence for attorneys engaged in litigation arising out of aviation accidents."

It is, then, a book destined for the practitioner, for the trial lawyer—and not for the student whose interest in legal questions is of a more theoretical and abstract character. However, the latter could probably find no better source book for learning something about the amazing amount and complexity of purely factual questions into which some basic and seemingly simple legal questions often need to be dissolved.

It is, furthermore, clearly a book the author of which may not even have thought of other readers than his American colleagues. However, it lists and treats the same questions that lawyers everywhere over the world will have to elaborate in aviation cases, and, let alone its purely American parts, it may therefore be used outside of the United States as well. This might in turn give some matter for reflection to lawyers interested in comparative law and in the unification of international law, theoretical as well as practical, the latter particularly in the field of aircraft accident investigation and of aviation liability.

A greater part of the fascination offered by air law results from the

fact that its *sedes materiae* is located in a technical frontier which is—and probably will remain for a long time to come—in full development, and which brings forth something new almost every day. This very fact however puts books like the present at some disadvantage and subjects them to a rather high gradient of obsolescence. To name but two examples: it is quite understandable, but still a pity that some essential parts of this manual, which was published in 1958, refer to legislation which has in the meantime been substantially amended by the Federal Aviation Act of 1958, and, in the technical field, it quite naturally cannot contain very much of the new facets which the jet age will add within the next few years to the negligence problem.

It might therefore be well worthwhile to consider publishing the second edition, which probably will be needed in the near future anyway, in two separate parts. One part would, in looseleaf form, contain the factual information which is particularly subject to frequent changes and amendments, whereas the other part would expound the basic principles of a more permanent nature, as to how to proceed and how to get at the needed facts in a given case. This could, at the same time, form the first step towards something like an international edition which would supply a real want in other countries as well.

WERNER GULDIMANN

BOUÈRE, J. P. *Le Droit de Grève,* Paris: Librairie Sirey, 1958. Pp. 443.

M. Bouère has added another highly scholarly and interesting volume to the valuable series of legal studies sponsored by the Law Faculty of the University of Algiers. His task was not easy. The problem of strikes presents a great number of theoretical and practical issues. All of them are central in labor-industrial relations and have been the subject in various countries of a great number of social and legislative experiments aimed at restricting or channeling workers' actions.

The broad foundation on which the author based his investigations is the book's strongest point. It is a comparative study drawing richly from the practice and laws of a great number of countries in Europe, the Americas, and the British Commonwealth of Nations. Mr. Bouère treats of the attitude and solutions adopted within the Soviet Orbit in a separate chapter, and draws a detailed picture of the situation there with great understanding and a wealth of information. Quite correctly, he draws a distinction between the Soviet legal rule and that of the satellite countries, in the process exploding the dogma of the Soviet pattern advanced by some scholars who have not demonstrated the same degree of profound, intimate familiarity with the legal systems of socialist nations.

The study of the situation in France is central in the treatment of the subject.

Mr. Bouère ends on a somewhat pessimistic note. The efforts to regulate the exercise of the right to strike by legislative action and thus to place it within the legal framework of each country have remained futile. Free societies of the Western type have, by institutionalizing strikes, legalized an instrument of social action which is very often socially disruptive and turns against them. Strikes, having remained outside the law, are frequently manifestations of disobedience of laws. Having stated the conditions under which the exercise of the right to strike would not make it an attack against society itself, the author comes to the conclusion that under present circumstances this is not practically possible, and that a jurist of a free society should abandon the illusion that social facts may follow a juristic construction.

The book contains copious tables of judicial decisions; an extensive bibliography, including a special section on the French literature on American trade-unionism, most useful for scholars in this country; tables of labor legislation of foreign countries, beginning with Finland and ending with Yugoslavia; and an alphabetical index, all of which add to the usefulness of this important publication.

KAZIMIERZ GRZYBOWSKI

EISEMANN, F.—MEZGER, E.—SCHOTTELIUS, D. J. *Internationale Schiedsgerichtsbarkeit in Handelssachen.* Frankfurt/Main, Berlin: Alfred Metzner Verlag, 1958. Pp. 85.

This first booklet in a series of "Studies in Comparative Law," published by the German Society of Comparative Law, deals with international commercial arbitration, a topic of growing importance. It consists of three reports submitted to the 1956 Hamburg Conference on Comparative Law.

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, of June 10, 1958, has fulfilled some of the authors' hopes for improving procedures for the enforcement of foreign awards (*cf.* P. Contini, this Journal (1959) p. 283). Messrs. Eisemann and Mezger discuss some areas of commercial arbitration related to foreign trade, whereas Mr. Schottelius deals with the establishment of a commercial arbitration system by coordinating the activities of national arbitration organizations and by adopting uniform rules of procedure. The value of the interesting booklet is enhanced by numerous references to further source material.

MARTIN DOMKE

WOLF, E.—LÜKE, G.—HAX, H. *Scheidung und Scheidungsrecht. Grundfragen der Ehescheidung in Deutschland.* Tübingen: J. C. B. Mohr (Paul Siebeck), 1959. Pp. xii, 487.

Under the leadership of Professor Max Rheinstein, Chicago, and initiated by The American Bar Association, an international investigation on the stability of the family has been undertaken. Scholars from many countries were and still are engaged in this task. The above book represents the German contribution and is the result of the scholarly collaboration between the universities of Chicago and Frankfurt am Main. Doctor Wolf, leader of the German team, is professor at the university of Frankfurt.

Can we influence the divorce rate through legislation, and if so, to what extent and under what conditions? In order to answer this question Dr. Lüke and Mr. Hax, an expert statistician, have assembled and skillfully presented statistics from different German states (pp. 382–471), mainly concerning the period 1880–1956 but also earlier years to some extent. These comparative statistics are completed by Dr. Lüke in a valuable way in his comparative presentation of the development of the different German divorce legislations (pp. 30–112).

The division of scholarly responsibility between the authors (p. vi) is not very clear, but it seems that Professor Wolf is accountable for the fundamental statements and conclusions (*"Grundauffassungen"*). Interpretation of statistical data is always difficult and requires caution and restraint, especially if the phenomena investigated are of a highly complex character. It seems to me that Professor Wolf's interpretation of the statistics takes its point of departure from very personal, individual convictions on, say, the "essence of marriage." Consequently, the numerous interesting and complicated problems evoked by the statistics in this book are not sufficiently elucidated and, I fear, often not even seen. We read on p. 225 that the codification of German private law in 1900 in the

Bürgerliches Gesetzbuch was not only a complete failure (*"vollständig gescheitert ist"*) in its attempt to restrain the divorce rate but even decisively furthered social disintegration in the field of marriage. It does not seem to me that an unbiased interpretation of the statistics would lead to this general conclusion. This is mentioned only as an example.

In this book, Professor Wolf is perhaps more of an enthusiastic prophet than a scholar. He holds a broad metaphysical outlook based on a firm personal conviction of the value of unrestricted human freedom; marriage is in its essence a relation between two free personalities, and thus its stability cannot be effectively influenced through abstract legal norms. If the legislator nevertheless tries, disaster may follow. Professor Wolf's introductory methodological chapter, its speculations on an ultimate "reality" and its repeated violent attacks on a rather mysterious "mathematical" outlook, would, if translated into English (is it possible?), offer rather perplexing reading for the American public.

In Wolf-Lüke-Hax's *Scheidung und Scheidungsrecht* we have valuable statistics and comparative historical analysis, but we are—so it seems to me—forced to seek a different interpretation of the statistics concerning fundamental questions. In so doing, we may take cognizance of Professor Wolf's interesting attempts at an interpretation, but critically. If read thus, the book is an inspiration for further research.

Its best parts include: the influence of social development on divorce (pp. 177–199), the constitutional background (pp. 233–242), and the divorce policy followed by the supreme court of West Germany (Bundesgerichtshof, pp. 310–331). The influence of the general social atmosphere on the behavior of judges in divorce cases seems to me a key problem, and the analysis of German court experience presented in this book is consequently of great significance for a general legal theory. The combination of historical and comparative research against an axiological background seems to me fruitful.

OTTO BRUSIIN

KEYERS, K. *Die Strafverfahren der Bundesrepublik und der Sowjetunion.* Bonn: Verlag H. Bouvier, 1957. Pp. 229.

The Soviet criminal reform passed in December, 1958, has dated this book somewhat more than it would be under normal circumstances. It is no longer an analysis of the law in force as far as the Soviet Union is concerned. However, it is still of value, in particular, as the author has included East German law which he considers a part of the Soviet legal system.

The organization of the study is simple. The first part consists of an exhaustive analysis of the criminal procedure of the German Federal Republic. This is followed by a similar treatment of Soviet and East German criminal laws, and concludes with their comparison and appraisal.

A comparison of the two types of procedure was bound to disclose the fundamental difference between the two legal systems. While West German courts and judicial officers are assured freedom from outside interference in their work, and politics are excluded from the courtrooms, in Soviet-type criminal proceedings courts, judges, public prosecutors, and virtually the entire mechanism of the administration of justice are an instrument of government policy.

The last chapter is of the greatest interest. It includes a discussion of the extraterritorial effect in West Germany of judicial decisions originating under the rule of Soviet-type law, a question of great practical significance in view of Germany's political and ideological division into two states.

KAZIMIERZ GRZYBOWSKI

DERBER, M.—YOUNG, E. (Eds.) *Labor and the New Deal.* Madison: The University of Wisconsin Press, 1957. Pp. xi, 393.

Few cultural phenomena affect more lives than labor's complex issues and problems. And few evoke greater emotionalism, partisanship, or misconceptions in the public mind. Therefore, this scholarly compilation of ten essays by Wisconsin and Illinois labor specialists, outlining American labor's evolution and its social, economic, and political role during the 1930's merits careful attention.

Co-editor Milton Derber explains that in the twenties liquidation of war-stimulated unionism, poor economic conditions, and bitter interunion factionalism greatly weakened the labor movement. The depression compounded these difficulties. Only economic recovery and the Roosevelt administration's encouragement of unionism enabled its leaders "to rebuild and expand their organization with phenomenal speed." Labor obviously failed to solve all its problems at this time, but by 1939 the resurgent AFL could boast over four million members, with the newly formed CIO showing comparable figures.

In tracing the schismatic forces shaping the CIO, Edwin Young points out that founder Samuel Gompers had organized the AFL as an affiliation of craft unions and that his successors held "the craft principle theoretically inviolate." They suspected the new hordes of unskilled and semiskilled industrial workers, whose jobs cut across traditional craft lines, of being "fair weather unionists" who would desert after attaining higher wages. This attitude prevented the AFL executive council from solving the growing internal rift, and the bitter debates of 1935 followed. From this struggle John L. Lewis emerged "as the strongest man in the American labor movement," and led the revolt of such labor figures as Sidney Hillman, David Dubinsky, and Thomas McMahon, among others. The rapid growth of their quickly formed Committee for Industrial Organization indicated clearly that "rebellion and civil war" were to prevail over any "class movement." And so quick were radical groups to take advantage of these unsettled conditions, charge Bernard Karsh and P. L. Garman, that by the end of the New Deal period left-wing union control was at an all-time high. Communists in particular so loaded the new CIO with organizers, speakers, and writers that only World War II destroyed their political influence.

Union expansion during the thirties owed much to government encouragement, with probably the most significant single piece of legislation being the 1935 Wagner Act. R. W. Fleming stresses that this act not only incorporated earlier liberal ideas but added the worker's right to organize, provided for elective procedure, required that employers bargain with duly elected union representatives, and most importantly, accelerated the labor movement's "psychological acceptance." Yet, strangely enough, New Deal policies failed to make unions politically powerful, for as Murray Edelman indicates, "workers have votes whether they are organized or not" and are more likely to "vote their pocketbook" than as union officials direct. Knowledgeable government leaders, therefore, have appealed consistently to workers as individuals rather than union members through social security and old-age pensions. Hence Elizabeth Brandeis emphasizes that not labor but depression and the Roosevelt administration were primarily responsible for the revolutionary labor legislation achieved in the thirties. And E. E. Witte adds that organized labor offered little direct support to early New Deal social security legislation,

although it has since championed many social benefit reforms.

Management, naturally, never ceased fighting for maximum "managerial authority and control," but as R. C. Wilcock explains, it soon shifted from direct factory opposition to legislative and public-opinion forums. The shift was caused by the rejection of company unionism and government regulation in favor of collective bargaining between independent unions and employers. D. E. Pullman and L. R. Tripp stress, however, that the government remained active through the National Labor Relations Board's influence upon the subsequent mandatory written contracts. On the other hand, collective bargaining's steady growth seriously curtailed the government arbitrator's jurisdiction. All in all, these labor changes established collective bargaining procedure down to the present.

Selig Perlman credits the combined labor and New Deal leadership of the thirties with having effected a governmental revolution comparable to that of Jefferson and Jackson, one which "spelled a new political climate" for the American worker. He concludes that labor's consistent "self-integration into the evolving American society" has proved vital not only to its own interests but to the democratic struggle against totalitarianism. By rejecting all "class hegemony" labor helps preserve "the principle of 'unity in diversity,' upon which western civilization rests."

Obviously, no single volume can treat adequately all the interrelated complexities of labor, management, and government. *Labor and the New Deal* does not try. But it does present a series of carefully documented, fair-minded, and clearly presented analyses of American labor's more vital aspects and implications during its more crucial decade. Few interested readers will be disappointed in this thorough, well-balanced study.

BEN SIEGEL

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Current Literature

Special Editor: CHARLES SZLADITS

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LIST OF RECENT BOOKS AND ARTICLES IN ENGLISH ON FOREIGN AND COMPARATIVE LAW *

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Bulletin

Special Editor: KURT H. NADELMANN

American Foreign Law Association

REPORTS

AMERICAN FOREIGN LAW ASSOCIATION, INC.—At the annual meeting of the American Foreign Law Association, held in New York City, March 13, 1959, the membership approved incorporation of the Association under the Membership Corporations Law of the State of New York and decided continuance in office of the then officers for the ensuing year or until new officers were elected. Certificate of incorporation and By-Laws were approved substantially in form as presented to the meeting. The Association has since been incorporated. The certificate of incorporation was filed with the Secretary of State in Albany on April 10, 1959. At the Board of Directors meeting of the incorporated Association, held on November 5, 1959, the following officers were elected to hold office until the first annual meeting of the Association: President: Alexis C. Coudert; Vice-Presidents: Arthur von Mehren, George J. Eder, W. Harvey Reeves, Hessel E. Yntema; Treasurer: Leon H. Doman; Secretary: Albert M. Herrmann. The retiring president, Otto C. Sommerich, was elected a director to fill the vacancy created by the election of Arthur von Mehren as Vice-President. The By-Laws as approved by the membership meeting of March 13, 1959, were confirmed for submission to the next meeting of the membership for ratification and confirmation.

The Association continued its relation with the International Association of Legal Science as United States national committee and its co-sponsorship of the American Journal of Comparative Law. It was represented at various international and national meetings, including a meeting called to form an International Association of Law Libraries. Meetings of the Association were addressed by the following speakers: Elihu Lauterpacht on "International Wrongs and National Remedies"; Dr. Ignaz Seidl-Hohenveldern on "Some Interesting Aspects and Consequences of Nationalization"; Professor Bernard Schwartz on "What Comparative Law Has to Teach Us in the Field of Administrative Law"; Dr. Martin Domke and Stephen Schwebel on "Implications of the Recent Decision in the Arbitration Proceedings of Jordan Investments Company. Ltd. v. Soviet Export Agency"; Professor Gerhard O. W. Mueller on "Recent Trends in Codification of Criminal Law on the European Continent and in Asia"; Charles M. Spofford on "The Suez Settlement"; Professor F. H. Lawson on "Recent Events in English Law."

ALBERT M. HERRMANN

INTERNATIONAL COMMITTEE OF COMPARATIVE LAW; LUXEMBURG MEETING—The annual meeting of the International Committee of Comparative Law as the executive bureau of the International Association of Legal Science was held at Luxemburg, July 30-August 1, 1959, on the invitation of the Luxemburg authorities. Messrs. Emil Sandström, president, M. Ancel (representing J. Hamel), C. J. Hamson (representing R. H. Graveson), H. N. Kubali, P. S. Romachkin (representing P. E. Orlovsky), S. Rozmaryn, F.

de Solá Cañizares, H. Valladão, H. E. Yntema, and K. Zweigert, members of the Committee, and also K. Szczerba-Likiernik of UNESCO, K. Lipstein, director of research, and I. Zajtay, secretary general of the Association, attended. Among other items, the term of President Sandström was extended for one year to coincide with the expiration of the terms of the Committee members in 1960; Professor René David was appointed temporary secretary general during Mr. Zajtay's projected absence in the autumn semester, 1959; and an invitation was extended to Professor David to succeed Dr. Lipstein as director of research as of January 1, 1960, with a view to the preparation of a long-range program for the Association.

In addition, national committees of Israel, Austria, and Luxemburg were accepted as members of the Association. The International Committee considered at length various questions of organization, including the proposals submitted on behalf of the United States National Committee. While the proposal to hold meetings biennially instead of annually failed to pass, it was agreed in principle that the Committee should include two Anglo-American and two Socialist representatives, leaving five memberships for other legal systems.

Among the works reported to the Committee as published or in preparation, the proceedings at various colloques (Chicago, Rome, Warsaw, Luxemburg) and additional legal bibliographies of Soviet and German Law, and the Bulletin of Information, deserve mention. Among other projects, the Committee indicated their interest in a biographical-historical survey of comparative law, a proposed dictionary of comparative law, and a new series of volumes on contemporary legal systems. The next annual meeting is to be held in Helsinki during the month of June, 1960, in connection with which two colloques are contemplated: one on "Nonperformance of sales contracts and *vis major*"; the other on the scientific program of the Association.

H. E. YNTEMA

XVIIth Congress of the International Chamber of Commerce—The International Chamber of Commerce held its XVIIth Congress in Washington, D. C., from April 20 to 25, 1959. Among the topics considered at group meetings was "Taxation in Relation to International Investments," "Commercial Arbitration," and "Industrial Property."

In the meeting on arbitration, the growing importance of arbitration in the settlement of disputes arising out of commercial transactions and investments between public bodies and private firms was discussed under the chairmanship of George W. Haight (USA). Vladimir Fabry (Legal Officer, United Nations), dealt with the United Nations' interest in international commercial arbitration as a contribution to the removal of existing obstacles to an increased flow of international trade and investment. Davidson Sommers (Vice President, International Bank for Reconstruction and Development) reported on the experience of that organization. Practical needs and possibilities were considered by Eugenio Minoli, Dean, Law Faculty of Modena (Italy), and George S. Nebolsine (USA); Martin Domke (USA) dealt with legal and administrative aspects of the new field of commercial arbitration between government agencies and foreign firms.

At the industrial property meeting, under the chairmanship of Stephen P. Ladas (USA), the challenge of industrial property as an essential factor in international law was discussed. Robert C. Watson, Commissioner, U.S. Patent Office, stressed the importance of close co-operation between patent offices throughout the world. Professor Pierre-Jean Pointet (Switzerland) dealt with the results of the Lisbon Conference and G. Oudemans (Netherlands) with

the repercussions of the European Common Market Treaty on industrial property.

MARTIN DOMKE

AMERICAN BAR ASSOCIATION SECTION OF INTERNATIONAL AND COMPARATIVE LAW—Once again the Section of International and Comparative Law of the American Bar Association can announce that a very successful meeting was held in Miami in August, 1959, at its annual convention. The following slate of officers was proposed and was voted upon by the membership: Chairman: J. Wesley McWilliams; Vice-Chairman: Eugene Bennett; Divisional Vice-Chairmen, International Law Division: Harry LeRoy Jones; Comparative Law Division: Edward D. Re; International Organizations: Wilder Lucas; Secretary: Harry Inman.

A General Session was held on August 23rd, at which time the committee reports of the International Law Division were presented and discussed. The reports of the Divisions of Comparative Law and International Organization were submitted to the Assembly the following day.

The joint breakfast annually sponsored by the Section together with the American Foreign Law Association was exceptionally successful. Mr. Victor Folsom, the chairman of the breakfast, introduced the speaker, Mr. Benjamin Busch, who, together with Mr. Otto Sommerich of New York, recently authored a very fine book entitled "Foreign Law—A Code to Its Pleading and Proof." Mr. Busch delivered a most interesting and valuable talk on the subject of Pleading and Proof of Foreign Law. The substance of his remarks will be set forth in the forthcoming annual Proceedings of the Section.

An item of special interest to all lawyers, and one of the most profitable general sessions over conducted by the Section, was the special Symposium conducted by Mr. Harry LeRoy Jones, the Divisional Vice-Chairman of the International Law Division of the Section, the general outline of which can best be described by reproducing the program.

I. Pre-trial and Trial Techniques in International Litigation: "Serving Process, Subpoenas and Other Documents in Foreign Territory," Henry N. Longley; "Taking Evidence by Deposition and Letters Rogatory and Obtaining Documents in Foreign Territory," Jerome Doyle; "Proving Foreign Law," John C. McKenzie; "Procedural Problems in the Administration of Estates and Trusts," Joseph T. Arenson. II. Work of the Commission on International Rules of Judicial Procedure: "Program and Work of the Commission and Advisory Committee of the International Law Division," Philip Amram. Mr. Jones is Director of the Commission.

EDWARD D. RE

INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE: LUXEMBURG COLLOQUE ON RECEPTION OF WESTERN LAWS IN TURKEY—From July 27 to July 30, 1959, the International Association of Legal Science held a colloque in Luxemburg on the reception of Western laws in Turkey, in continuation of the colloque in Istanbul in September, 1955 (this Journal, vol. 5 (1956) 168; for proceedings see Annales de la Faculté de Droit d'Istanbul (1956) No. 6, Le Colloque d'Istanbul), also organized as part of the general research program of the Association to consider the problems arising from "the reception of a foreign law in a country with different cultural and social tradition." The Turkish law reform under Mustafa Kemal (Atatürk) seemed to be a significant example for such a reception.

Pursuant to the plan submitted by the Turkish Committee and approved by the International Committee, the discussions at Luxemburg were based on the Turkish reports and the Swiss counterreports relating to the Turkish and Swiss decisions, various institutions under the respective codes, and

the effects of industrialization. Thirteen Turkish and seven Swiss jurists participated. Professor Kurt Lipstein (Cambridge) was general reporter.

Reports (N. Bilge, Ankara; F. H. Saymen, Istanbul—W. Yung, Geneva) comparing the decisions of the Turkish Court of Cassation and the Swiss Federal Court on the following subjects were discussed: (1) The right of a member of an association to judicial relief in case of exclusion; (2) protection of a party contracting in good faith, when the other party lacks discernment; (3) proof of good faith; (4) right of grandparents to relations with grandchildren; (5) effect of incapacity on the right of divorce.

Additional reports dealt with: restitution of possession (K. Birsen, Istanbul; F. Gilliard, Lausanne); nonregistered land titles (S. S. Tekinay, Istanbul); *hereditatis petitio* (K. T. Gürsoy, Ankara); the Swiss doctrine of legal succession (T. Çağa, Istanbul; Yung, Geneva); adoption (F. Arik, Ankara); foster children (B. Davran, Istanbul); rights of real owner of land registered in another's name (I. E. Postacioğlu, Istanbul); right of pre-emption (F. Feyzioğlu, Istanbul; R. Baer, Bern); *propriété par étage* (K. Oğuzman, Istanbul; H. Deschenaux, Fribourg); public administration and private law (T. B. Balta, Ankara); effects of industrialization on labor law (F. H. Saymen, Istanbul); general effects of industrialization on development of law (Z. F. Findikoğlu, Istanbul).

These reports and the discussions indicated that the reception of the Swiss Code in Turkey was successful. There is no doubt that some exceptional institutions cannot be assimilated. On the other hand, if difficulties arise, it does not mean always that the Western principle cannot be assimilated or must be rejected. Turkish lawyers are convinced that they must overcome certain difficulties. The principles of monogamy and obligatory civil marriage may be given as examples. The Turkish people are resolute in maintaining these institutions against resistant forces. The most important point is that the reception secularized the law in Turkey. In consequence, the law can be changed in correspondence with the needs of society, and the development of an independent legal science is secured.

B. DAVRAN

NEUCHÂTEL SESSION OF THE INSTITUTE OF INTERNATIONAL LAW—The Institute of International Law met for its 49th session under the presidency of M. George Sauser-Hall of Switzerland at Neuchâtel from September 3rd to 12th, 1959. Seventy-nine members and associates were present from 21 nations, 5 from the United States, 3 from Latin America, 1 from Africa, and 1 from Asia. The Institute remains dominated by European jurists but, with the increasing importance in the community of nations of states from other sections of the world, many members believe that to maintain its influence in the field it should have a broader geographical basis. However, the two new members elected at the Neuchâtel session were both Europeans, Professor Gregory I. Tunkin, of the University of Moscow, Chief of the International Law Division of the Soviet Foreign Office, member of the United Nations International Law Commission, and Professor André Gros of the University of Paris, legal advisor of the French Foreign Office.

Professor Alfred Verdross of the University of Vienna was elected President of the Institute. Hans Wehberg remains Secretary-General and Paul Guggenheim, Treasurer. It was decided to have the next meeting in 1961 in Austria. Professor Erik Castren of the University of Helsinki, Professor Henri Batiffol of the University of Paris, and Professor Phillip Jessup of Columbia University were elected Vice-Presidents. The latter, as well as Baron Van Asbeck of Leiden, Judge Plinio Bolla of Tessin, Switzerland, Professor Gaetano Morelli of Rome, and Professor

Paul de Lapradelle of Aix-en-Provence, France, were promoted from Associates to Titular Members.

Measures were taken to expedite the work of the commissions, and new commissions were established on the subjects of diplomatic protection under international law, the international law of outer space, and three subjects of private international law—marriage by procuration, adoption, and the legal position of testamentary executors and administrators of inheritances.

Action was taken on the work of three commissions during the session.

The report of Wilfred Jenks, Legal Advisor of the International Labor Organization, on compulsory jurisdiction of international courts and tribunals was unanimously adopted after extended debate. The resolutions in this report suggested that since recourse to arbitration or adjudication is a normal procedure in an international community which has renounced force for the settlement of disputes, proposals for such recourse should not be regarded as unfriendly acts. Furthermore, acceptance of international jurisdiction should not be illusory, and consequently reservations permitting self-interpretation of obligations to submit, such as the Connally Reservation made by the United States Senate, should be withdrawn and declarations under the optional clause of the International Court of Justice should be valid for a definite period of time, not less than five years, and should continue unless denounced on twelve months' notice. The resolutions also suggested that general conventions should include compromissary clauses, that arrangements for economic development should be subject to compulsory international jurisdiction, and that general economic and financial agreements between states should provide for compulsory adjudication of claims arising under them. *Voeux* were included emphasizing the need for better legal education on the subject of international adjudication and on the importance of a wider distribution of the decisions of international tribunals among jurists and legal practitioners.

Although no formal action was taken, debate indicated recognition of the need for enriching international law by the conceptions of justice from non-European civilizations in order to increase the confidence in, and acceptance of, international adjudication by countries of Asian, African, and Communist civilizations.

In the preamble to Dr. Jenks' report, reference was made to ten earlier resolutions of the Institute dealing with adjudication. No reference was made to article 36, paragraph 3, of the United Nations Charter which asserts "that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the statute of the Court," nor to article 36, paragraph 3, of the statute of the Court which asserts that declarations under the optional clause "may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time." These apparent commitments of numerous states, generally to utilize adjudication for the settlement of legal disputes and to refrain from reservations based on considerations other than reciprocity by certain states or duration, would, if taken literally, lend considerable support to the resolutions. But the Institute thought that the political connotation of the first of these commitments because of its relation to action by the Security Council, and the express understanding at the San Francisco Conference that the latter commitment should not be interpreted as limiting the capacity of states to make reservations to declarations under the optional clause, so reduced their legal significance that mention of them was inexpedient. Such mention might seem unduly critical of the states, parties to the Charter and the Statute, which have in fact paid little attention to these provisions.

The second report discussed was that presented by Professor J. P. A. François of The Hague on the law of war. A proposed resolution asserted that the rules of the law of war apply without discrimination to the parties to the conflict even if one party has been properly designated as an aggressor, and urged various limitations on the means of waging war, especially in regard to bombardments, civilian evacuations to protected zones, resistance movements in occupied territory, prisoners of war, and reprisals, all with a humanitarian objective.

In response to suggestions that an aggressor, while entitled to benefit by the humanitarian rules of war, ought not to benefit by the rules which permit belligerents to exercise extraordinary powers (*jus ex injuria non oritur*), and that further technical studies on the utilization of new weapons were required before practical limitations on their use could be formulated, the Institute decided to defer final action on the matter and authorized three commissions to make further studies. These will consider respectively the problem of equality in the application of the rules of war, the problems posed by the existence of arms of massive destruction, and the problem of civilian protection in economic war. The report as adopted especially authorized these commissions to invite the collaboration of independent experts if necessary.

The third report considered was presented by President Sauser-Hall on the international recognition and execution of arbitral sentences. A resolution concerning the conflict of laws arising from private arbitration had been approved in large measure at the Amsterdam session of the Institute in 1957, but the articles dealing with the execution of arbitral awards had been deferred because of lack of time and the pending consideration of the question by a United Nations Commission. The latter resulted in a convention signed in New York on June 10, 1958. The resolution adopted by the Institute gave due attention to this convention. It proposed a general obligation of states to recognize and execute foreign arbitral awards but qualified this obligation by precise statements which left a considerable margin of opportunity for refusal to execute. The resolution further stated the documents which should be presented by parties seeking such execution, and declared that the law of the state in which execution of the award is invoked should determine the procedure.

Time lacked at the Neuchâtel session to consider reports on the subjects of conciliation and *renvoi*. These topics and two on which the commissions met during the session—the use of waters of international rivers for purposes other than navigation, and conflict of law on matters of air law—will be considered at the next session of the Institute. The session achieved agreement on two important subjects, and the participants and their wives enjoyed several excursions displaying both the beauties of the region and the hospitality of the Swiss.

QUINCY WRIGHT

SECOND MEETING OF ORGANIZATIONS CONCERNED WITH UNIFICATION OF LAW —Under the auspices of the International Institute for the Unification of Private Law, a Second Meeting of Organizations Concerned with Unification of Law took place in Rome at Villa Aldobrandini, seat of the Institute, from October 11 to 15, 1959. Questions of method of unification, reserved for further discussion by the First Meeting, held in Barcelona in 1956 (this Journal, Vol. 5, No. 4, p. 705), and problems raised by different interpretations of uniform laws were on the agenda of the Rome meeting. A general report on the questions of method, prepared by Mr. Mario Matteucci, secretary general of the Institute, and reports by Messrs. Antonio Malintoppi and Jean Georges Sauveplanc on the second question were the starting point for the discussions.

Working papers had been submitted by organizations and experts in attendance.

The meeting was attended by representatives of world organizations (U.N., I.L.O., F.A.O., UNESCO, O.M.S.), of other inter-governmental organizations (Benelux, the Joint Offices for Protection of Patents and Copyright, E.C.C.E., the Hague Conference on Private International Law, Council of Europe, Nordic Council, The International Institute for the Unification of Private Law, Arabic League, the Central Office of International Transports by Rail), of non-governmental international organizations (International Chamber of Commerce, International Maritime Committee, International Law Association, International Union of Railways, International Union of Road Transports), of Inter-State organizations (the [U.S.] National Conference of Commissioners on Uniform State Laws), of some national institutes, as well as by a number of individually invited experts. From the United States, there were Commissioners Joe C. Barrett, James C. Dezendorf, George C. David, and Professors John Honnold and Kurt H. Nadelmann.

The sessions were chaired by Judge Ernesto Eula, the new president of the Institute, Dean Joseph Hamel, Paris, and Professor Petros G. Vallindas, Athens, respectively. The debates were in French or English, with translation into the other language provided for by the speaker or an interpreter.

In a closing statement, the meeting took note that certain questions present themselves in a different way according to the subject matter, and the organizations concerned. With this reservation, the meeting (1) acknowledged the usefulness of an exchange of information as regards activities in the field of unification of law and of periodic publication of such information; (2) thought that, in appropriate cases, it may be useful for the organizations to obtain assistance from qualified national and international research institutions; (3) noted that, with respect to interpretation of conventions and laws providing for uniform legislation, it is often advantageous to adopt and publish explanatory reports; (4) noted that it is desirable to use, whenever possible, terminology suited to the subject matter and, with due regard to the needs of the case, without recourse to national legal terms; (5) noted that it is desirable that decisions of courts dealing with uniform legislation are easily accessible. Among other questions discussed but reserved for further consideration were, notably: co-ordination between efforts of unification bearing on the same matter; the usefulness of indicating in domestic legislation that the provisions of the uniform legislation are of international origin and aim at bringing about unification of law; the problem of drafting international legislation in several languages; measures to resolve divergences of interpretation. The proceedings and papers of the meeting will be published by the Institute.

The participants expressed to the Institute for the efficient organization of the meeting and the social program which included a visit of Villa d'Este in Tivoli. The contribution of the Institute to international cooperation in calling these meetings of organizations concerned with unification of laws is obvious and deserving of full praise.

K. H. N.

ANNOUNCEMENTS

EIGHTH INTERNATIONAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION, SALZBURG, JULY 4–8, 1960—Information by the Secretary General of the Association, 501 Fifth Avenue, New York 17, N.Y. For the tentative program, see page 412, this Journal.

FORTY-NINTH CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION, HAMBURG, AUGUST 8–14, 1960—Information by the Hon. Secretary of the American Branch of the Association,

Vanderbilt Hall, New York University, New York 3, N.Y. For the tentative program, see page 412, this Journal.

FOURTH INTERNATIONAL CRIMINOLOGICAL CONGRESS, THE HAGUE, SEPTEMBER 5–12, 1960—Information by the Secretariat, 14, Burgemeester de Monchyplein, The Hague. The main theme for the Hague Congress will be the psycho-pathological aspects of criminal behavior.

INTERNATIONAL FACULTY OF COMPARATIVE LAW, LUXEMBURG—Spring session announced from March 21 to April 30, 1960, and a special session dealing with the European Communities from March 7 to April 8, 1960. Information concerning the program may be secured from the Secretary of the Faculty, 13, rue du Rost, Luxemburg.

VARIA

COMMISSION ON INTERNATIONAL RULES OF JUDICIAL PROCEDURE—The life of the Commission on International Rules of Judicial Procedure (see this Journal, Vol. 8, p. 341) has been extended to December 31, 1961, by Public Law 86–287, approved September 16, 1959. The Congress did not act, however, on the request for a supplemental appropriation.

LIBRARY OF CONGRESS NEAR EASTERN AND NORTH AFRICAN LAW DIVISION—Congress, in making appropriations for the library of Congress for the fiscal year 1959–60, provided funds for establishment of a Near Eastern and North African Law Division. It was formally opened on November 3, 1959. The American Bar Association had supported the creation of such a Division.

The new Division is responsible for the Law Library's reference, bibliographic, and consultative activities as they draw upon legal materials from the Near Eastern and North African countries. To enhance the quality of its service and insure the value of its resources, it will also develop and enlarge the legal collections for the countries within its jurisdiction—Morocco, Tunisia, Algeria, Libya, the United Arab Republic (Egypt and Syria), and the Sudan; Yemen, Saudi Arabia, Aden, the trucial states of Muscat and Oman, Bahrein, and Kuwait, Iraq, Jordan, Lebanon, Turkey, Iran, and Afghanistan.

The undersigned, a member of the Library of Congress staff in the Near East Section of the Orientalia Division and a member of the faculty of the School of Advanced International Studies of the Johns Hopkins University, Washington, D. C., has been appointed chief of the new Division. It is hoped that the professional staff of the Division can be expanded in the future to include additional lawyers educated in the Middle East.

The new Division will be dealing with an area of law itself broad and diverse, yet united by certain common elements in origin, heritage, and development. The services of the Division should be a valuable contribution to understanding in an area of knowledge which, in most libraries, is obscured by the inaccessibility or unavailability of source materials, or by the absence of specialists in locating, interpreting, and handling such materials.

E. JWAIDEH ZUHAIR